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In the Supreme Court of the United States

OCTOBER TERM, 1995

CONSTRUCTION PRODUCTS RESEARCH, INC.,
FIVE STAR PRODUCTS, INC. AND
H. NASH BABCOCK, *Petitioners*,

v.

UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. If—

> (a) a party subpoenaed by an agency maintains that it is not covered by the statute under which the subpoena is issued,
>
> (b) the agency has made an explicit, final determination that the party *is* covered by the statute, and
>
> (c) the party will have no future opportunity to contest coverage,

can a court order the subpoena enforced without first deciding the coverage issue?

2. Does an agency's general subpoena authority permit it to investigate matters not within its substantive jurisdiction?

3. In light of the plain meaning of the federal nuclear whistleblower statute (42 U.S.C. § 5851) and *English v. General Elec. Co.*, 496 U.S. 72, 83 & n.6 (1990), does the Nuclear Regulatory Commission have authority over employment practices?

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In the Supreme Court of the United States

OCTOBER TERM, 1995

CONSTRUCTION PRODUCTS RESEARCH, INC.,
FIVE STAR PRODUCTS, INC. AND
H. NASH BABCOCK, *Petitioners*,

v.

UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners respectfully pray that a writ of certiorari issue to review the judgment below.

Certiorari should be granted because the decision of the Court of Appeals conflicts with decisions of other circuits regarding both (1) the duty of the federal courts to adjudicate statutory coverage issues in subpoena enforcement proceedings where the agency has clearly staked out its position and there will be no future opportunity to litigate coverage, and (2) the need for agencies to have a specific statutory grant of substantive authority beyond mere general administrative subpoena provisions in order to support a subpoena. In any event, certiorari should be granted to reaffirm the teaching of *English v. General Elec. Co.*, 496 U.S. 72, 83 & n.6 (1990), that employment practices are the concern of the Secretary of Labor ("the Secretary") and not of the Nuclear Regulatory Commission ("NRC"). *See also Kansas Gas & Elec. Co. v. Brock*, 780 F.2d 1505, 1509 (10th Cir. 1985), *cert. denied*, 478 U.S. 1011 (1986).

The NRC issued a subpoena to investigate the employment practices of a cement company. When challenged, the agency sustained that subpoena in a published, final opinion which both asserted jurisdiction over the subject matter and found petitioners to be covered. *In re Five Star Products, Inc. and Construction Products Research, Inc.*, 38 NRC 169 (1993), App. 18a. Despite the confident tone of that opinion, the NRC was fully aware that it was testing the limits of its authority.[1]

Petitioners are neither NRC licensees nor their contractors, but are mere suppliers. As such, they are not subject to either the Atomic Energy Act ("AEA") or the employee protection provision of the Energy Reorganization Act of 1974 ("ERA"), 42 U.S.C. § 5851 (1994) ("§ 5851"). The NRC's only authority over petitioners is § 206 of the ERA, 42 U.S.C. § 5846 (1994) ("§ 5846"), which requires that certain product defects be reported to the NRC. The NRC's lengthy inquiry into the safety of petitioners' products was undertaken in an investigation under § 5846, which failed to identify any defects. That matter was ultimately resolved by agreement of the parties. Stipulation, *In re Five Star Products, Inc., et al.*, 61 Fed. Reg. 562 (1996), App. 71a.

Petitioners refused, however, to comply with the NRC's subpoena concerning their employment practices. The Court of Appeals held that petitioners could not litigate whether they are covered by the AEA at the subpoena enforcement stage and that the NRC need not identify a specific provision of the AEA or the ERA as a condition precedent to securing judicial enforcement of the subpoena. App. 1a.

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[1] When serving the subpoena, the NRC's lead investigator stated: "I guess now we'll find out whether we have jurisdiction over you or not." App. 118a (¶ 3); *see also* note 6 *infra*.

The Court of Appeals misapprehended the congressional allocation of responsibility between the NRC and the Department of Labor ("DOL"). Congress made the NRC responsible for nuclear safety, but made DOL responsible for employment practices even though DOL's work "obviously bears some relation to the field of nuclear safety." *English, supra*, at 83. The decision below scrambles this statutory framework yet denies petitioners an opportunity for a ruling on the NRC's investigative authority over their employment practices on the illusory notion that petitioners will have their day in court some other time.

Opinions Below

The opinion of Court of Appeals appears in the Appendix ("App.") at 1a and is reported at 73 F.3d 464. The unpublished order denying rehearing and declining rehearing *en banc* appears at App. 58a. The recommended ruling of Magistrate Judge Fitzsimmons and the notation ruling thereon by Judge Nevas of the District of Connecticut appear at App. 45a and 57a, respectively, and are unpublished.

Jurisdiction

The Court of Appeals decided petitioners' case on January 2, 1996. A timely petition for rehearing was denied on March 22, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1994).

Statutory Provisions

The NRC's basic grant of subpoena authority is found in AEA § 161(c), 42 U.S.C. § 2201(c) (1994), App. 60a. Section 161(c) is part of the statutory description of the NRC's "general duties," and authorizes the Commis-

sion, "[i]n the performance of its functions," to—

> "(c) make such studies and investigations, obtain such information, and hold such meetings or hearings as the Commission may deem necessary or proper to assist it *in exercising any authority provided* ***in this chapter***, *or in the administration or enforcement* ***of this chapter***, *or any regulations or orders issued* ***thereunder***. ***For such purposes*** the Commission is authorized to administer oaths and affirmations, and by subpena to require any person to appear and testify, or to appear and produce documents, or both, at any designated place. Witnesses subpenaed under this subsection shall be paid the same fees and mileage as are paid witnesses in the district courts of the United States; . . . ." [Emphases added.]

The employee protection provision of the ERA is § 5851, App. 62a. The NRC's only statutory authority over suppliers is § 5846, App. 60a, which is § 206 of the ERA. It requires corporate directors and officers to notify the NRC of violations of the AEA relating to substantial safety hazards or product defects which could create a substantial safety hazard. *Neither § 5846 nor § 5851 are part of the AEA. See* p. 19 & note 12 *infra.*

Statement

1. *Petitioners and Their Business.* Five Star Products, Inc. ("Five Star") markets, advertises and sells concrete and epoxy products for use in the construction industry. The products are standard commercial products. They are used, among many other places, in nuclear power plants in locations such as auxiliary buildings and drain pipes. Construction Products Research, Inc. ("CPR") holds

the patents for products developed and sold by Five Star. It also performs new product development services for, and provides test reports to, Five Star. It has in the past certified that cementitious grouts supplied by Five Star meet the NRC's quality assurance provisions. There is no physical difference between product runs that have been so certified and product runs that have not been so certified. The testing associated with the quality assurance certifications which CPR formerly performed was simply an additional run of the same tests that were and still are performed for all Five Star grouts as a precondition to paying the contract packagers' fee.

Under a December 28, 1995 stipulation between petitioners and the NRC, 61 Fed. Reg. 562 (1996), App. 71a, NRC licensees are free to use petitioners' products in nuclear facilities. The NRC revealed that (despite over three years of investigation) it had not received any reports that petitioners' products contain defects. *Id.*

Petitioners neither hold, have applied for, nor need an NRC license.

2. *The NRC's Two Investigations.* In 1992, Edward P. Holub, a CPR employee, furnished information to the NRC about Five Star's products. The information spawned *two* separate NRC investigations. App. 47a. The first was under § 5846 and began in 1992. App. 24a. It concerned the safety of Five Star's products. The second was under § 5851 and began in 1993, after Holub was fired. App. 4a, 26a-27a. The subpoena at issue, App. 69a, is part of the second (or § 5851) investigation. App. 27a, 47a.

a. *The § 5846 Investigation.* In the summer of 1992, acting on the basis of Holub's information, the NRC initiated an inspection/investigation of the safety of petitioners' products. That investigation continued for over three

years, and culminated in the stipulation referred to above.[2] Under the stipulation,

> "[t]he Companies and H. Nash Babcock are free to sell commercial-grade products to anyone in the nuclear industry as they now do. . . . Five Star Products' commercial-grade materials may be used in any safety-related applications provided that NRC licensees properly dedicate the materials for use as basic components and verify their suitability for the applications. As of the date of the settlement, NRC has not evaluated the quality of Five Star Products' materials, nor has the NRC received reports that Five Star Products' materials contain defects." App. 71a.

The NRC, therefore, has not identified *any* safety problems with petitioners' products, which are their only connection to the nuclear industry.

b. *The § 5851 Investigation.* CPR terminated Holub on January 22, 1993 based on inadequate job performance and failure to perform crucial responsibilities. Contending that he was actually terminated as a result of his contacts with the NRC, he filed a complaint with DOL under § 5851. That matter is currently before a DOL administrative law judge.[3]

---

[2] The stipulation was without prejudice to the parties' positions with respect to the NRC's jurisdiction or lack thereof over employment matters. App. 73a (¶ 4).

[3] The Court of Appeals' observation that Holub "has received a favorable decision" from DOL, App. 14a, is misleading. Petitioners' request for a hearing initiated a *de novo* trial-type proceeding in which the Wage and Hour Division's preliminary determination is not entitled to any weight or deference. Stephen M. Kohn, *The Whistleblower Litigation Handbook: Environmental, Nuclear, Health, and Safety Claims* § 2.2 (Supp. 1994) (collecting cases). To date, no hearing has

Notwithstanding the DOL proceeding, the NRC instituted a *second* investigation of petitioners based on Holub's termination. App. 4a, 26a-27a, 47a. According to the NRC, the purpose of this § 5851 Investigation is

> "to determine if CPR deliberately violated the NRC's whistleblower protection provision [10 C.F.R. § 50.7] by firing Mr. Holub when it discovered that he had informed the NRC of his safety concerns." *In re Henry Allen, Diane Marrone and Susan Settino*, 39 NRC 336, 345, 1994 NRC LEXIS 32, *7 (1994).

The subpoena was issued as part of the § 5851 Investigation. It seeks only employment-related documents:

> "any and all documents in your custody, control or possession relating in any way whatsoever to the termination of employment of Edward P. HOLUB on January 22, 1993, and the deliberations, discussions and communications that resulted in the decision to terminate MR. HOLUB . . . .
>
> "Additionally, you are commanded to provide the NRC with any and all company policies, procedures or requirements regarding involuntary terminations, along with position descriptions of jobs that were held by HOLUB, Stanley NOWACKI, and Richard GRABOWSKI for the period of 1987 to January 22, 1993, including, but not limited to, the duties and responsibilities of those positions, and the expectations associated therewith.
>
> "Finally, you are commanded to provide the NRC with the entire personnel file for HOLUB, including

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been held in the DOL case.

> any disciplinary warnings or actions; as well as attendance records and compensation, salary, bonus and/or payroll records concerning his employment during the period from 1987 to January 22, 1993." App. 69a-70a.

Obviously, the materials demanded have to do only with employment matters, and not the safety of petitioners' products.

3. *Proceedings Before the NRC.* Petitioners asked the NRC to quash the subpoena. The NRC's staff resisted this even while admitting that petitioners' products "did not constitute a safety concern." App. 48a n.9. The Commissioners claimed to have authority under § 5851, even though that provision unambiguously assigns responsibility for its administration to DOL. App. 30a. The NRC also relied on its general investigatory power under AEA § 161, *id.*, and drew support from the fact that each of the petitioners is a "person" as that term is defined in the AEA. 42 U.S.C. § 2014(s) (1994). App. 29a.

4. *Proceedings in the District Court.* A magistrate judge recommended enforcement of the subpoena on the theory that the NRC's investigation of petitioners' employment practices "is a legitimate inquiry into activities prohibited by Congress in 42 U.S.C. § 5851(c) [*sic*; should read (j)] which raise public health and safety concerns entrusted to the NRC by the AEA and supporting regulations." App. 54a. She also held that she "lack[ed] authority to determine whether the subpoenaed party is within the agency's jurisdiction or is covered by a statute it administers," App. 49a, that petitioners' "jurisdictional challenges to the lawfulness of the subpoena are not properly before the court in this summary enforcement proceeding," App. 51a, and that "[i]t is not for this court to review the agency's determination that [petitioners] are subject to NRC's statutory jurisdiction." App. 53a. Judge Nevas

approved, adopted and ratified the recommended ruling. App. 57a.

Petitioners sought a stay below and from Justice Ginsburg. When that was denied, all documents sought by the subpoena (other than those as to which a privilege is claimed) were turned over to the NRC.[4]

5. *The Decision of the Court of Appeals.* The Second Circuit affirmed, holding that petitioners are within the AEA definition of "person," App. 14a-15a, but refused to rule on petitioners' coverage contentions, noting that they could "challenge whether they fall within the NRC's enforcement jurisdiction" "[i]f and when the NRC decides to use the information obtained by the subpoena." App. 15a. The court explained that "the NRC might ultimately use the information to exercise its rule-making authority, to issue notices of non-conformance, or to provide reports to Congress." App. 13a. The court also held that "the NRC has the authority to conduct this particular investigation and to obtain the information sought by the subpoena," App. 15a, and that AEA § 161(c) "does not require that the precise nature and extent of an NRC *investigation* be articulated in a specific provision of the AEA or the ERA." App. 11a (emphasis in original). Notwithstanding the congressional allocation of responsibility described in *English*, the court held that the NRC can investigate employment practices because of the theoretical connection

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[4] Even if all of the subpoenaed documents had been produced, that would not moot the case. *Church of Scientology v. United States*, 506 U.S. 9 (1992). During the pendency of the appeal, the government moved for a contempt finding against petitioners. That motion was denied with the observation that the government's proper course is to move to compel production of the privileged documents. The government's request for reconsideration of that denial is pending in the District Court, as is its superseding application for a writ of assistance under FED. R. CIV. P. 70. The government has not moved to compel.

to nuclear safety. App. 12a-13a.[5] Notwithstanding the plain meaning of the subpoena, *see* pp. 7-8 *supra*, the court described the NRC as "attempting to investigate [petitioners'] *general* employment practices to determine whether those practices are having a chilling effect on would-be whistleblowers." App. 14a (emphasis in original).

Reasons for Granting the Petition

I

THE COURT OF APPEALS' REFUSAL TO RULE ON THE COVERAGE ISSUE AT THE SUBPOENA ENFORCEMENT STAGE CONFLICTS WITH DECISIONS OF OTHER CIRCUITS AND MISAPPLIES *ENDICOTT JOHNSON*

Petitioners argued before the NRC and below that they are not subject either to NRC regulation under the AEA or to the employee protection provisions of § 5851.[6]

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[5] Contrary to the Court of Appeals' suggestion (which is not supported by the record), petitioners have never maintained that § 5851 delegates to DOL "the task of investigating all potential nuclear safety risks resulting from adverse employment practices." App. 13a. Petitioners have never disputed the NRC's authority under § 5846 to investigate the safety of suppliers' products. Clearly, the NRC can investigate the safety of nuclear components, materials or licensed facilities such as nuclear power plants, regardless of what triggers such an investigation. *See generally* Point III *infra*.

[6] Petitioners are not covered by the NRC's licensing regime because nothing they do requires an NRC license. In a policy statement issued after the decision below, the NRC broadly cited the AEA in warning that it will "consider enforcement action" against licensees' contractors who are guilty of retaliation. *Policy Statement, Freedom of Employees in the Nuclear Industry to Raise Safety and Compliance Concerns without Fear of Retaliation*, 60 Fed. Reg. 24,336, 24,339 (col. 1) (1996). The NRC made no such claim in the Court of Appeals, *see* Point I(B) *infra*, and has long

The Court of Appeals refused to rule on these coverage issues. Instead, it observed that "[i]f and when the NRC decides to use the information obtained by the subpoena, [petitioners] may then challenge whether they fall within the NRC's enforcement jurisdiction." App. 15a. Both aspects of this analysis were mistaken. Questions of coverage are as proper for examination at the subpoena enforcement stage as are questions of agency substantive jurisdiction because they involve the lawfulness of the

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been aware that it lacks AEA authority over suppliers. *E.g.*, App. 75a, 85a, 87a, 90a, 93a-97a, 99a-116a. Nor are petitioners covered by § 5851: being mere suppliers (or materialmen) to licensees, rather than contractors or subcontractors, they are not "employers" as defined in that section. *See generally Adams v. Dole*, 927 F.2d 771, 776 (4th Cir.), *cert. denied*, 502 U.S. 837 (1991). A materialman is not a contractor. *See, e.g., Clifford F. MacEvoy Co. v. United States ex rel. Calvin Tomkins Co.*, 322 U.S. 102 (1944); *United States ex rel. Conveyor Rental & Sales Co. v. Aetna Cas. & Sur. Co.*, 981 F.2d 448, 456 (9th Cir. 1992); *United States ex rel. Bryant v. Lembke Constr. Co., Inc.*, 370 F.2d 293 (10th Cir. 1966); App. 120a-121a (¶ 4), 123a-124a (¶ 5) (industry usage). Intruding in an area in which it enjoys no expertise, the NRC mistakenly reasoned that all it takes to be a contractor is a contract. *Compare* App. 33a & n.4 *with MacEvoy, supra*, at 108-09; *In re Moroni Coal & Bldg. Supplies, Inc.*, No. 81M-02614 (Bankr. D. Utah May 25, 1984); *Garrett v. Tubular Products, Inc.*, 176 F. Supp. 101, 103-04 (E.D. Va. 1959); *Tiffany Constr. Co. v. Hancock & Kelley Constr. Co.*, 24 Ariz. App. 504, 510, 539 P.2d 978, 984 (1975). In another whistleblowing case, *Reid v. Methodist Medical Center of Oak Ridge*, No. 93-CAA-4 (1995), *petition for review pending sub nom. Reid v. Reich*, No. 95-3648 (6th Cir.), the Secretary correctly followed this Court's admonition in *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318 (1992), to apply common law principles when construing the term "employee." Refusing to grant summary judgment for petitioners, the administrative law judge presiding over Holub's DOL case failed to follow those precedents when he construed the term "employer." Rather, he deferred to the NRC's contention, asserted as an *amicus*, that to do otherwise would create a gap in the statute. Because the Court of Appeals refused to address petitioners' coverage arguments, it would be premature to ask this Court to rule on them. We have therefore not included them as Questions Presented.

agency's action. *See United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950). This is especially true where, as here, there will be no future opportunity to litigate the matter. The litigability of coverage questions at the subpoena enforcement stage is an important recurring issue as to which the circuits are divided.

A

***Endicott Johnson** does not bar review of coverage issues at the subpoena enforcement stage where the agency has already decided the coverage question and the subpoena does not seek information bearing on coverage*

The Court of Appeals either misread or misapplied *Endicott Johnson v. Perkins*, 317 U.S. 501, 508-09 (1943). That case recognized that the Secretary did not have to make a determination of statutory coverage before seeking enforcement of an investigative subpoena. Rather, it acknowledged that she "would have discretion to take up the issues of coverage for separate and earlier trial if she saw fit." *Id.* at 508-09. The Court barred district courts from injecting themselves into the administrative process *before* the Secretary decided the issue of statutory coverage.

Here the agency has made precisely the election which the Court said could have been—but was not—made in *Endicott Johnson*. The NRC's lengthy published opinion sustaining its own subpoena squarely and explicitly held that petitioners are "subject to the Commission's jurisdiction under section 161 of the AEA and section 211 of the ERA" (*i.e.*, § 5851). App. 30a (footnote omitted); *see also* App. 38a ("we are today asserting jurisdiction"). Accordingly, no purpose is served by deferring litigation of this issue. *Cf. McCarthy v. Madigan*, 503 U.S. 140, 148 (1992), *citing, inter alia, Houghton v. Shafer*, 392 U.S. 639, 640 (1968).

The circuits are divided over whether coverage issues such as those involved here are properly adjudicated at the subpoena enforcement stage. *Compare, e.g., Reich v. Great Lakes Indian Fish & Wildlife Comm'n*, 4 F.3d 490, 492 (7th Cir. 1993) (Posner, J.); *FTC v. Miller*, 549 F.2d 452, 460 (7th Cir. 1977) (rule against consideration of coverage questions at subpoena enforcement stage *held* inapplicable where issue was strictly legal); *FTC v. Feldman*, 532 F.2d 1092, 1096 (7th Cir. 1976); *Jewel Cos. v. FTC*, 432 F.2d 1155, 1159-60 (7th Cir. 1970); *Territorial Court of Virgin Islands v. Richards*, 673 F. Supp. 152 (D.V.I. 1987), *aff'd*, 847 F.2d 108 (3d Cir.), *cert. denied*, 488 U.S. 955 (1988); *FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380, 386-87 (D.C. Cir.), *cert. denied*, 454 U.S. 897 (1981); *FTC v. Ernsthal*, 607 F.2d 488, 491 & n.5 (D.C. Cir. 1979) (applying 7th Cir. rule arguendo);[7] *University of Richmond v. Bell*, 543 F. Supp. 321, 332 (E.D. Va. 1982), *with, e.g., EEOC v. Peat, Marwick, Mitchell & Co.*, 775 F.2d 928, 930 (8th Cir. 1985) (2-1 decision), *cert. denied*, 475 U.S. 1046 (1986); *Kloster, supra* note 7.

For its part, the Second Circuit has held that coverage issues are "initially to be determined by the agency, subject to review on direct appeal, rather than for a district court whose jurisdiction is invoked to enforce an administrative subpoena," *SEC v. Wall St. Transcript*

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[7] The Eleventh Circuit's position on the precise question of the reviewability at the subpoena enforcement stage of coverage issues that have been decided by the agency is unclear. In *FEC v. Florida for Kennedy Comm.*, 681 F.2d 1281, 1286 (11th Cir. 1982), it reversed a district court's refusal to address a coverage issue. In its subsequent decision in *EEOC v. Kloster Cruise Ltd.*, 939 F.2d 920 (11th Cir. 1991), it purported to embrace the different approach taken by the Eighth Circuit, *see infra*, but, even so, it stressed that many of the documents sought by EEOC "were requests to discover information that would be relevant to jurisdiction." *Id.* at 922-23. That is obviously not the case here. *See* pp. 7-8 *supra*.

Corp., 422 F.2d 1371, 1375 (2d Cir.), *cert. denied*, 398 U.S. 958 (1970), explaining in *SEC v. Brigadoon Scotch Distributing Co.*, 480 F.2d 1047, 1053 (2d Cir. 1973), *cert. denied*, 415 U.S. 915 (1974), that agencies must be free to develop a factual basis for determining whether the activities at issues are within their regulatory authority.[8] Until this case, however, the Second Circuit appears not to have been presented with a subpoena enforcement controversy where the agency had taken a final position on a coverage issue and its subpoena was in no way addressed to developing a record on coverage.

The basic structure of the relationship between courts and agencies compels the rule that the agency be afforded an opportunity to address coverage questions before they are presented to a court—even where the agency is content to let the court have the initial say. *FMC v. Port of Seattle*, 521 F.2d 431, 436 (9th Cir. 1975); *but see FTC v. Manufacturers Hanover Consumer Services, Inc.*, 543 F. Supp. 1071, 1074-75 & n.7 (E.D. Pa. 1982) (accepting agency concession that question of agency jurisdiction could

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[8] There is nothing wrong with an agency's using its subpoena power to help in deciding coverage issues. *E.g., Peat, Marwick, supra*, 775 F.2d at 930 (information sought would have assisted agency in determining whether partners are "employees" for purposes of Age Discrimination in Employment Act); *FTC v. Shaffner*, 626 F.2d 32, 36 (7th Cir. 1980) (agency's subpoena "properly designed to illuminate [Fair Debt Collection Practices Act coverage] questions"); *ICC v. Gould*, 629 F.2d 847, 850 (3d Cir. 1980), *cert. denied*, 449 U.S. 1077 (1981) (agency sought, *inter alia*, to determine whether party was subject to Interstate Commerce Act); *ICC v. Peninsula Shippers Ass'n, Inc.*, 789 F.2d 1401, 1402 (9th Cir. 1986) (same). Here, however, the NRC has never claimed—and the text of the subpoena nowhere suggests—that the information sought in the subpoena would help to determine whether petitioners are within the coverage of any statute for which the NRC has responsibility. Any such claim would certainly have been puzzling in light of the fact that the NRC's lengthy opinion refusing to quash the subpoena expressly decided the coverage issues.

be reached, and noting inconsistency between *Machinists* and *Ernsthal*). But when an agency commits itself on the scope of its authority (as has the NRC) *before* seeking judicial enforcement of a subpoena, the agency has ruled and "that determination may be reviewed by the appropriate court." *Port of Seattle, supra*, 521 F.2d at 434. Unless such a ruling is reviewed by the appropriate court at the subpoena enforcement stage, *see* Point I(B) *infra*, the subpoenaed party will have suffered the intrusion, distraction and expense of compliance with a subpoena that serves no lawful purpose. Absent such review, this Court's condemnation of "officious intermeddling," *Oklahoma Press Pub. Co. v. Walling*, 327 U.S. 186, 213 (1946), will be merely a catchy phrase and an empty promise.

"Compliance with a subpoena is a burden, and one that a person or institution that can show it is not subject to the regulatory regime in aid of which the subpoena was issued should not be required to bear." *Great Lakes, supra*, 4 F.3d at 492 (citing *Oklahoma Press, supra*, 327 U.S. at 217). As the Second Circuit itself has recognized, there is "no point in permitting the Government to institute an investigation with its attendant inconvenience, expense and annoyance if there is and can be no authority for undertaking it." *United States v. Cabrini Medical Center*, 639 F.2d 908, 910 (2d Cir. 1981). "Questions of regulatory jurisdiction are properly addressed at the subpoena-enforcement stage if, as here, they are ripe for determination at that stage." *Great Lakes, supra*, 4 F.3d at 492.

Under *Endicott Johnson* and the other authorities we have cited, petitioners were entitled to review of the § 5851 coverage issue because the NRC has already decided it. As we now explain, the time for such review must be now because there will never be another.

B

Petitioners will have no other opportunity to litigate the NRC's authority to subpoena their employment records

The fruits of the subpoena cannot be used to sanction petitioners because petitioners are not subject to the NRC's licensing or civil penalty powers under the AEA. 42 U.S.C. subch. IX & § 2282 (1994); *see, e.g.*, App. 87a, 90a, 93a-97a, 108a-112a. The decision below mentions only three uses the NRC might make of the information sought under the subpoena: reports to Congress, rule-making and issuance of Notices of Nonconformance. App. 13a. None of these support the notion that petitioners will have a future opportunity to litigate the NRC's authority to subpoena their employment records. The Court of Appeals' contrary view disregards settled principles of administrative law.

Mere government reports that "carr[y] no direct consequences" are not reviewable final agency action.[9] As for the Court of Appeals' reference to possible rule-making, the NRC has given no indication that it intends to engage in rule-making on this subject, which could not have retroactive effect in any event. *Bowen v. Georgetown Univ.*

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[9] *Dalton v. Specter*, 114 S. Ct. 1719, 1724 (1994); *Franklin v. Massachusetts*, 505 U.S. 788, 798 (1992); *see also, e.g., Natural Resources Defense Council, Inc. v. Hodel*, 865 F.2d 288, 316-19 (D.C. Cir. 1988) (Ruth Bader Ginsburg, Starr and Sentelle, JJ.); *Taylor Bay Protective Ass'n v. EPA*, 884 F.2d 1073, 1080-81 (8th Cir. 1989); *Natural Resources Defense Council, Inc. v. Lujan*, 768 F. Supp. 870, 881-82 (D.D.C. 1991); *Greenpeace USA v. Stone*, 748 F. Supp. 749, 765-66 (D. Haw. 1990), *appeal dismissed as moot*, 924 F.2d 175 (9th Cir. 1991) (per curiam); *see* 2 Kenneth C. Davis & Richard J. Pierce, Jr., *Administrative Law Treatise* § 15.15, at 385 (3d ed. 1994) (noting difficulty of line-drawing "if courts *began* to review" agency action that lacks force of law but has significant indirect adverse effects, citing investigative reports and congressional testimony as examples) (emphasis added).

Hosp., 488 U.S. 204, 208 (1988).[10]

This leaves only Notices of Nonconformance as a potential occasion for judicial scrutiny of the NRC's thus far judicially unexamined claim of authority over petitioners. The NRC describes these notices (previously known as Notices of Deviation, App. 108a n.19) as "[r]elated administrative actions" which "supplement its enforcement program." *General Statement of Policy and Procedure for NRC Enforcement Actions*, § VI.D, 60 Fed. Reg. 34,381, 34,392 (col. 3) (1995). But they are still not reviewable final agency action. Because they are merely "written notices describing vendor's failures to meet commitments which have not been made legally binding requirements by NRC," *id.* § VI.D.1, they are not a sanction within the meaning of § 2 of the APA. 5 U.S.C. § 551(10) (1994). They lack the teeth required for APA review. *See* 5 U.S.C. § 551(13) (1994); Alfred C. Aman, Jr. & William T. Mayton, *Administrative Law* § 9.4.5, at 275 (1993). A LEXIS check of federal cases reveals no instance in which such an NRC notice has been the subject of judicial review.

Since, therefore, none of the three hypothetical agency measures cited by the Court of Appeals will ever furnish petitioners an opportunity to litigate their challenge to the NRC's authority to investigate their employment practices, the premise for the court's refusal to rule on the scope of the NRC's authority at the subpoena enforcement stage is fallacious. So far as petitioners' right to judicial review is concerned, it's now or never. "The choice," as

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[10] While a new rule would be reviewable, and perhaps *someone* would have standing to seek review, that would not be petitioners if all they had to complain about was the fact that the subpoenaed documents had found their way into the rule-making record. Such an objection would be at best peripheral to the review process, the purpose of which is to sustain or overturn rules, not to decide whether the agency obtained documents in the record by *ultra vires* means. A court reviewing an NRC regulation would give such a petition for review short shrift.

Justice Murphy observed in *Estep v. United States*, 327 U.S. 114, 131 (1946) (Murphy, J., concurring), "is obvious."[11]

II

THE COURT OF APPEALS' RELIANCE ON THE NRC'S GENERAL SUBPOENA AUTHORITY, WITHOUT A GRANT OF SUBSTANTIVE JURISDICTION, CREATES A CONFLICT AMONG THE CIRCUITS

The Court of Appeals sustained the NRC's subpoena under AEA § 161(c) without requiring the NRC to identify a specific statutory grant of authority for its investigation of petitioners' employment practices. The difficulty with this is that § 161(c) is only an administrative provision, as opposed to a grant of substantive authority. Like the magistrate judge in this case, App. 52a n.6, five circuits have held that such provisions are insufficient, and that there must be a separate substantive grant of authority. *In re Sealed Case*, 42 F.3d 1412, 1418 (D.C. Cir 1994); *RTC v. Grant Thornton*, 41 F.3d 1539, 1546 (D.C. Cir. 1994); *United States v. Newport News Shipbuilding & Dry Dock Co.*, 837 F.2d 162, 166 (4th Cir. 1988); *United States v. Montgomery County Crisis Center*, 676 F. Supp. 98, 99 (D. Md. 1987); *Burlington Northern R. Co. v. Office of Inspector General*, 983 F.2d 631, 641-43 (5th Cir. 1991); *EEOC v. Ford Motor Credit Co.*, 26 F.3d 44, 47 (6th Cir. 1994); *FTC v. Winters National Bank*, 601 F.2d 395, 400 n.10 (6th Cir. 1979); *Peters v. United States*, 853 F.2d 692, 695-700 (9th Cir. 1987). A grant of certiorari is necessary to resolve the conflict generated by the decision below.

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[11] *See also UAW v. Brock*, 783 F.2d 237, 250-51 (D.C. Cir. 1986); *Dep't of Energy v. Brimmer*, 673 F.2d 1287, 1292 (Temp. Emer. Ct. App. 1982); *In re Grand Jury*, 619 F.2d 1022, 1025-27 (3d Cir. 1980).

The issue is fundamental to agency practice. It is of the highest importance, since the ruling below gives any federal agency a roving commission to issue subpoenas willy nilly regardless of whether the subpoenaed party is subject to the agency's regulatory sweep, so long as they fit within the openended definition of "person," as the NRC argued here and as the Second Circuit held. Unless it requires the agency to identify the specific statutory authority on which a subpoena rests, the subpoena enforcement court abdicates its duty to determine the core question of whether the investigation is lawful. *Morton Salt*. It is not sufficient simply to intone the words "Atomic Energy Act" and, in effect, let it go at that, as happened here.

Congress knows how to craft a substantive grant of subpoena power: it gave the NRC such a grant in § 5846. But it never gave the NRC the power to investigate employment practices (which is what *this* subpoena plainly does). And even if—decisions such as *Sealed Case* notwithstanding—there was no need for a substantive grant of authority to bring § 161(c)'s general subpoena provision into play, this subpoena could not be sustained since § 161(c) by its terms only extends to matters arising under the AEA, and § 5851 is not part of the AEA.[12]

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[12] Relying on its own prior decision in *County of Rockland v. U.S. Nuclear Regulatory Comm'n*, 709 F.2d 766, 768-69 (2d Cir.), *cert. denied*, 464 U.S. 993 (1983), the Court of Appeals describes the ERA as having amended the AEA. App. 3a, 11a. This is incorrect. *See* 88 Stat. 1233 *passim*. Section 5851 was added to the ERA in 1978. 92 Stat. 2951. The AEA and the ERA are different chapters of title 42. As a result, § 161(c), which repeatedly focuses on "this chapter" (*i.e.*, ch. 23, or the AEA) does not extend to § 5851 (which is part of ch. 73, or the ERA). Section 5846(a) makes it clear that Congress understood the ERA to be distinct from the AEA, since it refers to "any activity or facility which is licensed or otherewise regulated pursuant to the Atomic Energy Act of 1954 as amended *or* pursuant to this chapter" (emphasis added). Indeed, § 5846 repeatedly refers to the AEA as if it were separate legislation, which it is. *See* § 5846 (a)(1), (b), (c). The overall statutory structure explains why

III

THE COURT OF APPEALS' DECISION TO PERMIT THE NRC TO INVESTIGATE PETITIONERS' EMPLOYMENT PRACTICES CONFLICTS WITH *ENGLISH v. GENERAL ELECTRIC* AND THE TENTH CIRCUIT'S DECISION IN *KANSAS GAS*

In *English*, 496 U.S. at 83 n.6, the Court observed that "the enforcement and implementation of [§ 5851] was entrusted by Congress not to the NRC—the body primarily responsible for nuclear safety regulation—but to the Department of Labor." It is difficult to imagine a clearer statement on the matter. It is a reading that finds complete support in the plain meaning of the statute.

The Court of Appeals, however, took the position that the NRC's subpoena, which on its face is addressed to employment matters, was nonetheless a proper exercise of the NRC's authority because of the potential chilling effect of personnel policies and practices on product safety.[13] The

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Congress provided the NRC with a *separate* grant of investigative authority over suppliers in § 5846(d); it would not have had to do so if the ERA were merely part of the AEA or if § 161(c) extended to suppliers such as petitioners. The Court of Appeals' mistake in characterizing the relationship between the AEA and the ERA thus led it to overlook the textual inapplicability of § 161(c) to the investigation underlying the disputed subpoena.

[13] The Court of Appeals relied on an NRC Atomic Safety and Licensing Appeal Board's decision that was never subjected to judicial review. *Union Elec. Co. (Callaway Plant, Units 1 & 2)*, 9 NRC 126 (1979); App. 14a. Unlike petitioners, however, Union Electric (against which the NRC ultimately took enforcement action, 9 NRC at 128) was an NRC licensee and the employer in question was its on-site contractor. Even if *Callaway* was correctly decided, therefore, it is no precedent for the NRC's attempt to exercise employment practices investigative jurisdiction over suppliers such as petitioners.

effect, of course, is both to slight *English* and perform a transparent and impermissible "end run" around it. *English* recognized that nuclear safety and employment practices are not mutually exclusive concerns; the Court noted that Congress assigned employee protection to DOL despite the fact that whistleblowing "obviously bears some relation to the field of nuclear safety." 496 U.S. at 83. Safety concerns are implicit in § 5851. *Norman v. Niagara Mohawk Power Corp.*, 873 F.2d 634, 637 (2d Cir. 1989).

In *Kansas Gas, supra*, the Tenth Circuit discussed the allocation of responsibility for employment matters, observing that jurisdiction over such matters "resides in the Secretary of Labor and that *the NRC is not free to accept jurisdiction of these matters concurrently or in its discretion.*" 780 F.2d at 1509 (emphasis added). The Tenth Circuit was correct. Although the Second Circuit has cited *Kansas Gas* and followed its approach, *Norman, supra*, the decision below is irreconcilable with *Kansas Gas* as to the NRC's lack of a role in employment matters.

Nuclear safety is an important public concern. But that concern—and the fact that there is "some relation" between the protection of employees and nuclear safety—did not empower the Court of Appeals either to refuse to address petitioners' showing that they are not covered by the statutes relied on by the NRC, *see* Point I *supra*, or to rewrite the clear congressional division of responsibility between the NRC and DOL. "An agency does not 'possess[] *plenary* authority to act within a given area simply because Congress has endowed it with *some* authority to act in that area.'" *Seafarers Int'l Union v. U.S. Coast Guard*, 81 F.3d 179, 186 (D.C. Cir. 1996) (quoting *Railway Labor Executives' Ass'n v. Nat'l Mediation Board*, 29 F.3d 655, 670 (D.C. Cir. 1994) (en banc), *cert. denied*, 115 S. Ct. 1392 (1995)). Thus, the NRC does not have authority over every matter that is related—however tangentially—to nuclear safety. *See Reynolds v. United States*, 286 F.2d 433 (9th Cir. 1960);

note 5 *supra*.

It is difficult not to conclude that the Court of Appeals permitted itself to be influenced by the government's talismanic incantation of the words "nuclear safety." To be sure, the government is free to ask Congress to alter the allocation of agency responsibilities to fit the theory the Court of Appeals was persuaded to embrace. But the mere fact that the judiciary has been asked to enforce an agency subpoena does not shift legislative authority to it.

Nor does the current allocation of responsibilities in any way compromise nuclear safety. Thus, DOL can draw on the NRC's expertise if it needs to, *see generally* 47 Fed. Reg. 54,585 (1982) (NRC-DOL Memorandum of Understanding), and, as the expert agency in employment law matters, DOL has shown itself to be alert to chilling effect issues:

> "The termination of a whistleblower can have a 'chilling effect' on the workforce, and the Department of Labor has the remedial power to correct this chilling effect. The Secretary has used this power to require plantwide posting of anti-discrimination orders. Likewise, under the chilling effect analysis, employers have been ordered to modify internal memoranda which discouraged employees from reporting allegations to the Nuclear Regulatory Commission. . . ." Kohn, *supra* note 3, § 7.4, at 103 (1991) (footnotes omitted).[14]

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[14] According to the Secretary of Labor, DOL's function is not merely that of "providing a forum for private parties to litigate their private employment discrimination suits." *McCoy v. Utah Power/Pacific Power*, Nos. 94-CAA-1, 94-CAA-6 (Sec'y of Labor Mar. 22, 1994) (citations to ERA cases omitted). Rather, the Secretary has observed that "protected whistleblowing may expose not just private harms, but health and safety hazards to the public." *Id.*

Conversely, the NRC has power under § 5846 to investigate the safety of suppliers' products. It has used that power in connection with petitioners' products, ultimately identifying no defects, receiving no complaints and finding no reason to bar their use. App. 71a. Once the NRC publicly confirmed that petitioners' products could be used, Stipulation, *supra*, it was incumbent on the Court of Appeals—even if its reasoning had not run afoul of *English* and the plain meaning of § 5851—to reverse with instructions to dismiss the petition for enforcement because its safety rationale could no longer be applied to those products.

Because the decision below conflicts with *English* and *Kansas Gas*, review is essential.

Conclusion

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JUNE 1996

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 342—August Term, 1995
(Argued: October 30, 1995
Decided: January 2, 1996)
Docket No. 95-6067

UNITED STATES OF AMERICA,

Petitioner-Appellee,

—v.—

CONSTRUCTION PRODUCTS RESEARCH, INC.;
FIVE STAR PRODUCTS, INC.;
and H. NASH BABCOCK,

Respondents-Appellants.

Before:

NEWMAN, *Chief Judge,*
ALTIMARI, and MCLAUGHLIN, *Circuit Judges.*

Respondents-Appellants appeal from an order of the United States District Court for the District of Connecticut (*Nevas, J.*), enforcing an administrative subpoena issued by the Nuclear Regulatory Commission, and rejecting their claim of privilege.

AFFIRMED.

MICHAEL F. MCBRIDE, LeBoeuf, Lamb, Greene & MacRae, L.L.P., Washington, D.C. (Deirdre G. Johnson, LeBoeuf, Lamb, Greene & MacRae, L.L.P., Washington, D.C.; Harold James Pickerstein, Trager and Trager, Fairfield, CT; Eugene R. Fidell, Mark M. Brandsdorfer, Feldesman, Tucker, Leifer, Fidell & Bank, Washington, D.C., of counsel), for *Respondents-Appellants.*

KATHERINE S. GRUENHECK, Attorney, Appellate Staff Civil Division, Department of Justice, Washington, D.C. (Frank W. Hunger, Assistant Attorney General, Christopher F. Droney, United States Attorney, Barbara C. Biddle, Attorney, Appellate Staff Civil Division, Department of Justice, Charles E. Mullins, Senior Attorney, Office of the General Counsel, Washington, D.C., of counsel), for *Petitioner-Appellee.*

MCLAUGHLIN, *Circuit Judge:*

The Nuclear Regulatory Commission ("NRC") issued a subpoena, requiring Construction Products Research, Inc. ("CPR"), Five Star Products, Inc. ("Five Star"), and their Custodian of Records, H. Nash Babcock (together, "Respondents") to produce employment records of certain employees and other employment-related documents. Respondents moved before the NRC to quash the subpoena, but their motion was denied. Asserting that the NRC lacked authority to enforce the subpoena and that certain documents were privileged, Respondents refused to comply.

The United States, on behalf of the NRC, petitioned to enforce the subpoena in the United States District Court for the District of Connecticut (Alan H. Nevas, *Judge).* The district court referred the petition to a magistrate judge (Holly B. Fitzsimmons, *Magistrate Judge*), who recommend-

ed that the petition be granted and that Respondents' claim of privilege be rejected. The district court adopted the magistrate judge's recommendation, issued an order of enforcement, and denied a motion for reconsideration of the privilege issue. Respondents appealed, and moved to stay the enforcement order in the district court, this Court, and in the Supreme Court. All three courts denied the motion. Respondents thereafter turned over to the NRC only those documents which they agreed were not privileged, refusing to surrender the allegedly privileged documents.

Respondents now appeal. We affirm.

BACKGROUND

The NRC is an administrative agency whose job is to regulate atomic energy and safety pursuant to the Atomic Energy Act of 1954 ("AEA"), 42 U.S.C. § 2011 *et seq.*, as amended by the Energy Reorganization Act of 1974 ("ERA"), 42 U.S.C. § 5801 *et seq.* *See County of Rockland v. United States Nuclear Regulatory Comm'n*, 709 F.2d 766, 769 (2d Cir.), *cert. denied*, 464 U.S. 993 (1983). The NRC has authority over public health and safety issues relating to the nuclear power industry in general, and over safety aspects involved in constructing and operating nuclear power plants, in particular. *See* 42 U.S.C. §§ 2012, 2201; 10 C.F.R. § 1.11.

Five Star manufactures grout and structural concrete products used to construct and repair nuclear power plants. CPR holds the patents for products developed and sold by Five Star. During the period at issue, it also provided testing services to Five Star, thereby ensuring that the grout complied with NRC safety standards. CPR's testing enabled Five Star to certify to NRC licensees that its products met NRC safety regulations. Both CPR and Five Star operate out of the same facility in Fairfield, Connecticut.

In 1992, a CPR employee, Edward Holub, contacted the NRC to express his concern that improper procedures were being used to test Five Star products. The NRC investigated CPR's facility, but was denied access to the testing laboratory. The NRC obtained and executed a search warrant, seizing numerous documents related to CPR's testing of Five Star's products.

Before the NRC completed that investigation, CPR fired Holub. Contending that CPR terminated him in retaliation for tipping off the NRC, Holub filed a claim with the Department of Labor ("DOL"), seeking reinstatement and damages under the Whistleblower Protection Provision of the ERA, 42 U.S.C. § 5851. After investigating Holub's claim, the DOL found that he had engaged in protected activity and was, indeed, unlawfully terminated. An appeal of that finding is still pending.

The NRC thereafter instituted a second investigation. This time, it wished to determine whether Respondents' past treatment of whistleblowers posed a threat to public health and safety. It was specifically interested in whether, by discouraging would-be whistleblowers from coming forward, it increased the likelihood that safety defects escaped detection. As part of this second investigation, the NRC issued the subpoena involved here, requiring Respondents to produce: (1) all documents related to Holub's termination; (2) Holub's personnel file; (3) all of Respondents' policies, procedures, and requirements regarding involuntary terminations; (4) and "position descriptions of jobs" held by Holub and two other employees. Respondents moved before the NRC to quash the subpoena, but the NRC denied the motion. Asserting that the subpoena arose out of an unauthorized investigation, Respondents refused to comply with it.

The United States, on behalf of the NRC, filed a petition to enforce the subpoena in the United States District Court for the District of Connecticut. The district

court referred the petition to a magistrate judge, who recommended that the petition be granted and that Respondents' claim of privilege be rejected as a general defense to enforcement of the subpoena. The district court adopted the magistrate judge's recommended ruling *in toto*, and issued an order of enforcement. This ruling appears not to have considered the applicability of the privilege to any particular document, though it is arguable that the district court's denial of Respondents' motion to reconsider constituted a rejection of the privilege as to all documents for which privilege had been claimed. Respondents appealed, but turned over to the NRC those documents which they conceded were not privileged, while refusing to produce allegedly privileged documents.

On appeal, Respondents argue that (1) the NRC did not have the authority to issue this subpoena; and (2) even if it did, the district court erred by failing to recognize that some of the documents sought by the subpoena were privileged.

DISCUSSION

I. *Jurisdiction*

There is a threshold problem. The parties assume we have jurisdiction under 28 U.S.C. § 1291, to hear a direct appeal from an administrative subpoena enforcement order, prior to finding someone in contempt of that order. Although our conclusion is by no means obvious, we hold, as have other courts, that we do have jurisdiction.

Section 1291 permits review only of "final" district court orders. *See* 28 U.S.C. § 1291. The general rule is that orders enforcing subpoenas issued in connection with civil and criminal actions, or grand jury proceedings, are *not* final, and therefore *not* appealable. *United States v. Ryan*, 402 U.S. 530, 532-33 (1971); *Cobbledick v. United States*,

309 U.S. 323, 328 (1940); *Reich v. National Eng'g & Contracting Co.*, 13 F.3d 93, 95 (4th Cir. 1993); *Kemp v. Gay*, 947 F.2d 1493, 1495 (D.C. Cir. 1991). To obtain appellate review, the subpoenaed party must defy the district court's enforcement order, be held in contempt, and then appeal the contempt order, which is regarded as final under § 1291. *Ryan*, 402 U.S. at 532; *Cobbledick*, 309 U.S. at 328; *National Eng'g*, 13 F.3d at 95; *Kemp*, 947 F.2d at 1495. "The purpose of this rule is to discourage parties from pursuing appeals from orders enforcing these subpoenas, which would temporarily halt the district court's litigation process or the grand jury process." *National Eng'g*, 13 F.3d at 95.

There is a different rule, however, in administrative proceedings. A district court order enforcing a subpoena issued by a government agency in connection with an administrative investigation may be appealed immediately without first performing the ritual of obtaining a contempt order. *Id.*; *Kemp*, 947 F.2d at 1495; *see, e.g., Church of Scientology v. United States*, 506 U.S. 9, 113 S. Ct. 447, 449 (1992); *Reisman v. Caplin*, 375 U.S. 440, 449 (1964); *Ellis v. ICC*, 237 U.S. 434 (1915). The rationale is that, at least from the district court's perspective, the court's enforcement of an agency subpoena arises out of a proceeding that "may be deemed self-contained, so far as the judiciary is concerned . . . . [T]here is not, as in the case of a grand jury or trial, any further judicial inquiry which would be halted were the offending [subpoenaed party] permitted to appeal." *Cobbledick*, 309 U.S at 330; *see National Eng'g*, 13 F.3d at 95-96; *Kemp*, 947 F.2d at 1496; *In re Letters Rogatory Issued by Director of Insp. of Gov't of India*, 385 F.2d 1017, 1018 (2d Cir. 1967). Thus, although the NRC did not obtain the customary contempt order before it filed this appeal, we nonetheless have jurisdiction, pursuant to § 1291, to review the district court's order enforcing the subpoena at issue here.

We further note that although Respondents have largely complied with the subpoena, they have not surrendered the allegedly privileged documents. Thus, this case is not moot, at least as to those documents. Even as to the surrendered documents, the case is not moot because Respondents still contest the authority of the NRC to have issued the subpoena in the first place. "[S]o long as the appellant retains some interest in the case, so that a decision in its favor will inure to its benefit, its appeal is not moot." *New England Health Care Employees Union v. Mount Sinai Hosp.*, 65 F.3d 1024, 1029 (2d Cir. 1995). Here, Respondents have a privacy interest in all the documents, and will be entitled to their return if the enforcement order should be vacated. *Church of Scientology*, 113 S. Ct. at 449-50 (holding that production of all records sought by unlawful summons does not moot claim, because summoned party has privacy interest in getting them back); *Reich v. Montana Sulphur & Chem. Co.*, 32 F.3d 440, 443-44 n.4 (9th Cir. 1994) (same).

II. *Agency Subpoena Power*

Respondents' central theme is that the NRC lacks the authority to issue a subpoena to conduct an investigation into retaliatory employment practices; rather, they urge that such authority is vested solely in the DOL. They further argue that, even if the issuance of such a subpoena is within the NRC's statutory grant of authority, the NRC's investigatory power does not extend to Respondents because they are mere suppliers. In light of the historically expansive interpretation of an agency's power to investigate, we conclude that this subpoena lay well within the NRC's authority because it is the primary body responsible for nuclear safety.

A. *Historical Background*

Until the 1940s, the Supreme Court narrowly interpreted the scope of an agency's investigative authority. An administrative subpoena was valid only if the agency sought evidence of a specific breach of law. *See, e.g., Jones v. SEC*, 298 U.S. 1, 27 (1936) ("A general, roving . . . investigation, conducted by a commission without any allegations . . . is unknown to our constitution and laws; and such an inquisition would be destructive of the rights of the citizen, and an intolerable tyranny.") (internal quotations and citations omitted); *FTC v. American Tobacco Co.*, 264 U.S. 298, 305-06 (1924) ("Anyone who respects the spirit as well as the letter of the Fourth Amendment would be loath to believe that Congress intended to authorize one of its subordinate agencies to sweep all our traditions into the fire, and to direct fishing expeditions into private papers on the possibility that they may disclose some evidence of crime.") (internal citation omitted). Accordingly, courts would routinely disallow a general investigation conducted solely to determine policy, make rules, recommend legislation, or ascertain whether administrative or other action was even appropriate. *See generally* Kenneth Culp Davis & Richard J. Pierce, Jr., *Administrative Law Treatise* § 4.1 (3d ed. 1994).

Beginning with *Endicott Johnson Corp. v. Perkins*, 317 U.S. 501 (1943), however, the Supreme Court underwent a change and significantly loosened the shackles on an agency's power to conduct administrative investigations. In *Endicott Johnson*, the Secretary of Labor was investigating whether Endicott Johnson had violated the Walsh-Healey Public Contracts Act, which barred government contracts to those who violate minimum-wage laws. *Endicott Johnson*, 317 U.S. at 506.

The Secretary issued a subpoena for certain payroll records; Endicott Johnson refused to comply, asserting that

the records were not "relevant to the determination of any matter confided to the Secretary's determination." *Id.* at 507. The Secretary sought enforcement of the subpoena. The district court denied the motion, and set the case down for trial on the question whether the Walsh-Healey Act applied to Endicott Johnson and its employees. *Id.* The Supreme Court held that the district court erred by doing so; rather, it held that in the first instance, an agency could decide whether persons/entities were covered by the relevant statute and could exercise its subpoena power to investigate whether a cause of action existed:

> Nor was the District Court authorized to decide the question of coverage itself. The evidence sought by the subpoena was not plainly incompetent or irrelevant to any lawful purpose of the Secretary in the discharge of her duties . . . . The consequence of the action of the District Court was to disable the Secretary from rendering a complete decision on the alleged violation . . . .

Id. at 509.

Endicott Johnson was a watershed in administrative investigations. It was now established that an agency could conduct an investigation even though it had no probable cause to believe that any particular statute was being violated. *See United States v. Powell*, *379 U.S.* 48, 57 (1964) (agency "need not meet any standard of probable cause to obtain enforcement of [its] summons"); *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 201 (1946) (agency may conduct an administrative investigation "to discover and procure evidence, not to prove a pending charge or complaint, but upon which to make one if, in the [agency's] judgment, the facts thus discovered should justify doing so"). Indeed, an administrative agency, like a grand jury, could now "investigate merely on suspicion that the law is

being violated, or even just because it wants assurance that it is not." *United States v. Morton Salt Co.*, 338 U.S. 632, 642-43 (1950); *see also SEC v. Brigadoon Scotch Distrib. Co.*, 480 F.2d 1047, 1053 (2d Cir. 1973), *cert. denied*, 415 U.S. 915 (1974) (agency "must be free without undue interference or delay to conduct an investigation which will adequately develop a factual basis for a determination as to whether particular activities come within the [agency's] regulatory authority"); *United States v. Oncology Servs. Corp.*, 60 F.3d 1015, 1018-19 (3d Cir. 1995). Moreover, at the subpoena enforcement stage, courts need not determine whether the subpoenaed party is within the agency's jurisdiction or covered by the statute it administers; rather the coverage determination should wait until an enforcement action is brought against the subpoenaed party. *See Endicott Johnson*, 317 U.S. at 509; *Brigadoon*, 480 F.2d at 1052-53. *But see Reich v. Great Lakes Indian Fish and Wildlife Comm'n*. 4 F.3d 490, 492 (7th Cir. 1993) (statutory coverage could be decided at subpoena enforcement stage, if target of investigation admitted wrongdoing and coverage issue could be determined without examining subpoenaed documents).

This is not to say that an agency may conduct any investigation it may conjure up; the disclosure sought must always be reasonable. *Oklahoma Press*, 327 U.S. at 209; *SEC v. Arthur Young & Co.*, 584 F.2d 1018, 1023 (D.C. Cir. 1978), *cert. denied*, 439 U.S. 1071 (1979). This limitation of reasonableness is satisfied "[s]o long as an agency establishes that an investigation 'will be conducted pursuant to a legitimate purpose, that the inquiry may be relevant to the purpose, that the information sought is not already within [its] possession, and that the administrative steps required . . . have been followed.'" *SEC v. Wall St. Transcript Corp.*, 422 F.2d 1371, 1375 (2d Cir.), *cert. denied*, 398 U.S. 958 (1970) (quoting *Powell*, 379 U.S. at 57-58); *see also Morton Salt*, 338 U.S. at 652; *Brigadoon*, 480 F.2d at 1053.

B. *The NRC Subpoena*

Respondents deny that the NRC acted within its statutory authority when it inquired into Holub's termination and its possible nuclear safety implications; and even if it did, Respondents challenge whether that authority may be exercised against mere suppliers.

The AEA, 42 U.S.C. § 2011 *et seq.*, as amended by the ERA, 42 U.S.C. § 5801 *et seq.*, establishes a comprehensive regulatory framework for the ongoing review of nuclear power plants in the United States. *See County of Rockland, 709* F.2d at 768-69. Under the AEA and the ERA, the NRC is charged with primary responsibility to ensure that the generation and transmission of nuclear power do not unreasonably threaten public safety and welfare. *Id.;* 42 U.S.C. § 2012. Consistent with its administrative mandate, the NRC is authorized to:

> make such studies and investigations, obtain such information, and hold such meetings or hearings *as the [NRC] may deem necessary or proper to assist it* in exercising any authority provided in this chapter, . . . or any regulations or orders issued thereunder. For such purposes the [NRC] is authorized . . . by subpena to require *any person* to . . . appear and produce documents . . . .

42 U.S.C. § 2201(c) (emphasis added); *see also Oncology Servs.*, 60 F.3d at 1019.

Although an agency investigation must be conducted for a legitimate purpose, *see Brigadoon*, 480 F.2d at 1054; *In re Sealed Case*, 42 F.3d 1412, 1418 (D.C. Cir. 1994), § 2201(c) does not require that the precise nature and extent of an NRC *investigation* be articulated in a specific provision of the AEA or the ERA. Rather, § 2201(c) makes clear that an NRC investigation is proper if it "*assist*[s the NRC]

in exercising any authority provided in this chapter, . . . or any regulations or orders issued thereunder." 42 U.S.C. § 2201(c) (emphasis added); *see also FTC v. Rockefeller*, 441 F. Supp. 234, 240 (S.D.N.Y. 1977), *aff'd*, 591 F.2d 182 (2d Cir. 1979). And, pursuant to NRC regulations, the NRC may exercise its authority through standards-setting and rulemaking; technical reviews and studies; public hearings; issuance of authorizations, permits, and licenses; inspection, investigation, and enforcement; evaluation of operating experience; and confirmatory research. 10 C.F.R. § 1.11(b).

The NRC asserts that the purpose of its subpoena is to determine whether Respondents' treatment of whistleblowers poses a threat to public health and safety by discouraging would-be whistleblowers from coming forward, thereby increasing the likelihood that safety defects will escape detection. That a widespread employment practice of squelching employee disclosure of nuclear risks might have serious safety implications takes no stretch of the imagination:

> Common sense tells us that a retaliatory discharge of an employee for 'whistleblowing' is likely to discourage others from coming forward with information about apparent safety discrepancies. Yet, [the NRC's] safety inspectors cannot be everywhere; to an extent they must depend on help of this kind to do their jobs. Incidents that deter such aid are inherently suspect. They obviously merit full exploration in the interests of safety and certainly are *prima facie* within [the NRC's] legislative charter.

Union Elec. Co. (Callaway Plant, Units I & 2), 9 N.R.C. 126, 134 (1979). Unless the NRC is permitted to investigate whether an employer regularly stifles disclosure of possible nuclear hazards, this practice could go unchecked—a situation rife with safety ramifications.

Here the information sought by the subpoena could reveal an employment practice of discouraging whistleblowing. On the other hand, it might merely assure the NRC that such practices are not taking place. *See Morton Salt Co.*, 338 U.S. at 642-43. Under its mandate to ensure safety from nuclear risks, the NRC might ultimately use the information to exercise its rule-making authority, to issue notices of non-conformance, or to provide reports to Congress. *See* 10 C.F.R. §§ 1.11(b), 2.201; 42 U.S.C. § 2210(p). In any event, the information sought by the subpoena is "not plainly incompetent or irrelevant to any lawful purpose" of the NRC "in the discharge of [its] duties." *Endicott Johnson*, 317 U.S. at 509. We therefore find that the issuance of the subpoena was within the NRC's statutory authority.

Respondents argue, however, that pursuant to the Whistleblower Protection Provision of the ERA, *see* 42 U.S.C. § 5851, Congress delegated to the DOL—not the NRC—the task of investigating all potential nuclear safety risks resulting from adverse employment practices. We disagree. The Whistleblower Protection Provision provides, in relevant part:

> No employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee . . . caused to be commenced . . . a proceeding under . . . the [ERA] or the [AEA].

42 U.S.C. § 5851(a)(1)(D). An employee who claims retaliation under this section must file a complaint with the DOL, which may then investigate the allegations and make a determination. *See* 42 U.S.C. § 5851(b). Congress logically gave the power to resolve § 5851 retaliation claims to the DOL, as those claims are within the DOL's particular area

of expertise. *See English v. General Elec. Co.*, 496 U.S. 72, 83 n.6 (1990) ("[T]he *enforcement and implementation* of [§ 5851] was entrusted by Congress not to the NRC—the body primarily responsible for nuclear safety regulation—but to the Department of Labor.") (emphasis added); *Norman v. Niagara Mohawk Power Corp.*, 873 F.2d 634, 637 (2d Cir. 1989).

It bears emphasis, however, that the NRC is not trying to adjudicate Holub's individual retaliation claim; Holub himself has already filed a claim with the DOL and has received a favorable decision. Instead, the NRC is attempting to investigate Respondents' *general* employment practices to determine whether those practices are having a chilling effect on would-be whistleblowers. That aim is quite distinct from the aim of the DOL investigation:

> [T]he [NRC's] investigatory powers and those of the [DOL] under [§ 5851] neither serve the same purpose nor are invoked in the same manner. They are, rather, complementary, not duplicative . . . . Under [§ 5851] the [DOL] apparently lacks two remedial powers—which the [NRC] possesses—. . . the right to take important action against the employer, and the . . . authority to do so immediately . . . . [T]he [DOL] may order only reinstatement and back pay—not correction of the dangerous practices themselves."

Union Electric, 9 N.R.C. at 138; *cf.* 42 U.S.C. § 5851(j)(2) (a DOL finding that a retaliation claim has no merit "shall not be considered by the [NRC] in its determination of whether a substantial safety hazard exists").

We further reject Respondents' argument that they are not subject to the NRC's investigatory power. Section 2201(c) authorizes the NRC to subpoena "any person." The term "person" encompasses "any individual, corporation,

partnership, firm, association, trust, estate, public or private institution, group, Government agency other than the [NRC] . . . ." 42 U.S.C. § 2014(s). Respondents clearly fall within this broad definition. If and when the NRC decides to use the information obtained by the subpoena, Respondents may then challenge whether they fall within the NRC's enforcement jurisdiction. *See Oklahoma Press*, 327 U.S. at 201 (holding that although agency must defend purpose behind investigation, it is not required to prove cause of action at subpoena enforcement stage); *Endicott Johnson*, 317 U.S. at 509; *Brigadoon*, 480 F.2d at 1053; *Newmark & Co. v. Wirtz*, 330 F.2d 576, 578 (2d Cir. 1964). We conclude, therefore, that the NRC has the authority to conduct this particular investigation and to obtain the information sought by the subpoena.

III. *Privilege*

Respondents also argue that the district court erred in holding that they had failed to establish their claims of privilege. Whether we consider the district court to have rejected the claim of privilege narrowly as a defense to enforcement of the subpoena or more broadly as a defense to the production of particular documents claimed to be privileged, we disagree with Respondents' claims.

Privileged documents are exempt from disclosure. *Morton Salt*, 338 U.S. at 653. The party asserting the privilege must establish the essential elements of the privilege. *United States v. Adlman*, 68 F.3d 1495, 1499 (2d Cir. 1995); *von Bulow by Auersperg v. von Bulow*, 811 F.2d 136, 144 (2d Cir.), *cert. denied*, 481 U.S. 1015 (1987). To invoke the attorney-client privilege, a party must demonstrate that there was: (1) a communication between client and counsel, which (2) was intended to be and was in fact kept confidential, and (3) made for the purpose of obtaining or providing legal advice. *Fisher v. United States*, 425 U.S.

391, 403 (1976); *Adlman*, 68 F.3d at 1499; *United States v. Abrahams*, 905 F.2d 1276, 1283 (9th Cir. 1990).

Respondents also assert a work-product privilege. To invoke this privilege, a party generally must show that the documents were prepared principally or exclusively to assist in anticipated or ongoing litigation. *See* Fed. R. Civ. P. 26(b)(3); *Bowne of New York City, Inc. v. AmBase Corp.*, 150 F.R.D. 465, 471 (S.D.N.Y. 1993).

To facilitate its determination of privilege, a court may require "an adequately detailed privilege log in conjunction with evidentiary submissions to fill in any factual gaps." *Bowne*, 150 F.R.D. at 474; *see also In re Grand Jury Investigation*, 974 P.2d 1068, 1071 (9th Cir. 1992). The privilege log should:

> identify each document and the individuals who were parties to the communications, providing sufficient detail to permit a judgment as to whether the document is at least potentially protected from disclosure. Other required information, such as the relationship between . . . individuals not normally within the privileged relationship, is then typically supplied by affidavit or deposition testimony. Even under this approach, however, if the party invoking the privilege does not provide sufficient detail to demonstrate fulfillment of all the legal requirements for application of the privilege, his claim will be rejected.

Bowne, 150 F.R.D. at 474 (citations omitted); *see also von Bulow*, 811 F.2d at 146; *In re Grand Jury Subpoena Dtd. Jan. 4, 1984*, 750 F.2d 223, 224-25 (2d Cir. 1984).

We have reviewed Respondents' privilege log, and find it deficient. The log contains a cursory description of each document, the date, author, recipient, and "comments." Further, under a heading entitled "Basis of

Claim," each of the documents listed is alleged to be an "Attorney-Client Communication."

These general allegations of privilege, however, are not supported by the information provided. For example, descriptions and comments for some of the documents listed are as follows: (a) "Fax Re: DOL Findings" with comment "cover sheet;" (b) "Fax: Whistleblower article" with comment "Self-explanatory;" (c) "Letter Re: Customer Orders" with comment "Re: Five Star Products;" (d) "Summary of Enclosures" with comment "Self-explanatory;" *etc.* The descriptions and comments simply do not provide enough information to support the privilege claim, particularly in the glaring absence of any supporting affidavits or other documentation. *See Bowne*, 150 F.R.D. at 475; *Allendate Mut. Ins. Co. v. Bull Data Sys., Inc.*, 145 F.R.D. 84, 88 (N.D. Ill. 1992) (privilege log should provide "a specific explanation of why the document is privileged").

We have fully considered all other claims advanced on this appeal and find them to be without merit.

CONCLUSION

The NRC had the authority to issue the subpoena, and Respondents have failed to demonstrate their claims of privilege. Thus, the judgment of the district court is AFFIRMED.

Cite as 38 NRC 169 (1993) CLI-93-23

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Ivan Selin, Chairman
Kenneth C. Rogers
Forrest J. Remick
E. Gail de Planque

In the Matter of OI Docket No. 1-93-027R

FIVE STAR PRODUCTS, INC.
and CONSTRUCTION PRODUCTS
RESEARCH, INC. October 21, 1993

The Commission denies Petitioners' motion to quash or modify a subpoena issued by the NRC Staff in the course of an investigation to determine if Petitioners have violated NRC regulations and to determine if safety-related problems exist at NRC-licensed facilities. The new enforcement date for the subpoena is November 1, 1993.

REGULATIONS: INTERPRETATION AND APPLICABILITY (10 C.F.R. § 50.7)

Section 50.7 of 10 C.F.R. was adopted both in implement section 211 of the Energy Reorganization Act and to incorporate into NRC regulations the Commission's authority under section 161 of the Atomic Energy Act.

NRC: ENFORCEMENT OF SUBPOENAS

In general, an agency subpoena is enforceable if (1) it is for a proper purpose authorized by Congress; (2) the information sought is clearly relevant to that purpose and

adequately described; and (3) statutory procedures are followed in the subpoena's issuance.

ENERGY REORGANIZATION ACT: EMPLOYEE PROTECTION

The philosophy underlying the adoption of section 211 of the Energy Reorganization Act and its implementing regulations is that any employee of an NRC licensee or of a firm that deals directly or indirectly with NRC licensees on nuclear-related matters and who is in the position to have information relating to nuclear safety must feel free to come to the NRC with that information.

NRC: HEALTH AND SAFETY RESPONSIBILITIES

A defect in the materials provided by a "supplier" or "vendor" can prove just as dangerous to public health and safety as a defect in materials provided by a "contractor" that has a more complex or long-term relationship with the NRC licensee.

NRC: HEALTH AND SAFETY RESPONSIBILITIES

The risk to public health and safety—and the NRC's responsibility to protect that public health and safety—is not measured simply by the length of time in the contractual relationship between the NRC licensee and the commercial entity providing the goods and services at issue.

ENERGY REORGANIZATION ACT: EMPLOYEE PROTECTION

NRC: HEALTH AND SAFETY RESPONSIBILITIES

The protection afforded to employees who may be able to provide information to the NRC regarding threats to the public health and safety cannot be measured by the length of their employer's contract with the NRC licensee.

NRC: HEALTH AND SAFETY RESPONSIBILITIES

The risk to public health and safety, the NRC's responsibility to protect it, and the amount of protection afforded to "whistleblower" employees cannot be measured by the length of the contractual relationship between a licensee and a supplier of goods. This is especially true where the "supplier" offered goods and services that were certified to meet the NRC's requirements for installation in safety-related applications.

NRC LICENSEES: CONTRACTUAL RELATIONSHIPS

Filling a purchase order issued by an NRC licensee by a vendor or "supplier" constitutes a contract between those two parties.

REGULATIONS: INTERPRETATION AND APPLICABILITY (10 C.F.R. § 50.7)

ENERGY REORGANIZATION ACT: EMPLOYEE PROTECTION (CONTRACTORS)

The term "contractor" in section 211 of the Energy Reorganization Act and 10 C.F.R. § 50.7 of NRC regulations includes—at a minimum—employers such as "vendors" or "suppliers" that manufacture and offer for sale materials that are (1) intended for use by NRC licensees and (2) certified to meet the requirements of 10 C.F.R. Part 50, Appendix B.

REGULATIONS: SAFETY STANDARDS

Cement and grout sold to NRC licensees under Part 50 Appendix B certification are "basic components" whose failure could create a substantial safety hazard, as defined by 10 C.F.R. § 21.3(a)(1) and (2).

REGULATIONS: SAFETY STANDARDS

A vendor or supplier who itself certifies its products were manufactured and sold in accordance with Part 21 cannot reverse itself and allege that Part 21 does not cover the manufacture of these products.

REGULATIONS: SAFETY STANDARDS

A vendor or supplier who certifies that its products were manufactured and sold in accordance with Part 21 is required to "permit duly authorized representatives of the [NRC] to inspect its records, premises, activities, and basic components as necessary to effectuate the purposes of [Part 21]." 10 C.F.R. § 21.41.

ENERGY REORGANIZATION ACT: EMPLOYEE PROTECTION (CONTRACTORS)

REGULATIONS: INTERPRETATION AND APPLICABILITY (10 C.F.R. § 50.7)

An entity that maintains an on-going contractual relationship with a manufacturer to test that manufacturer's products, which are then sold to NRC licensees, is a "subcontractor" of the manufacturer within the meaning of section 211 of the Energy Reorganization Act and 10 C.F.R. § 50.7.

ENERGY REORGANIZATION ACT: EMPLOYEE PROTECTION

"Whistleblowers" are protected under section 211 of the Energy Reorganization Act and 10 C.F.R. § 50.7, regardless of the accuracy of their allegations.

ENERGY REORGANIZATION ACT: EMPLOYEE PROTECTION

A supplier's subsequent act of ceasing to sell materials certified under 10 C.F.R. Part 50 Appendix B does

not remove an employee's protection for engaging in protected activity that occurred prior to that supplier's ceasing to sell such materials.

REGULATIONS: INTERPRETATION AND APPLICABILITY (10 C.F.R. § 50.7)

For purposes of 10 C.F.R. § 50.7, the term "contractor" is not limited to those persons who perform work within the protected area.

REGULATIONS: INTERPRETATION AND APPLICABILITY (10 C.F.R. § 50.7)

For purposes of 10 C.F.R. § 50.7, the NRC has jurisdiction over an employer with a long history of providing materials, including safety-related materials, to the nuclear industry and over acts by that employer that are directly related to its transactions with NRC licensees.

NUCLEAR REGULATORY COMMISSION: INVESTIGATIVE AUTHORITY

Congress intended, in passing the Energy Reorganization Act, that the NRC have the ability to conduct its own investigations under the Atomic Energy Act during the pendency of a Department of Labor proceeding.

NRC: HEALTH AND SAFETY RESPONSIBILITIES

The remedies provided by an arbitrator in a "whistleblower" case are similar to those provided by the Department of Labor in such a case—they assist the employee as an individual. Those remedies do not assist the NRC in performing the duties assigned it by Congress—protecting the rights of workers in the nuclear industry and ensuring the free flow of information to the NRC.

RULES OF PRACTICE: DISCOVERY RULINGS

The Commission will not rule on claims of privilege in discovery disputes in the abstract.

MEMORANDUM AND ORDER

I. INTRODUCTION

This matter is before the Commission on a motion by both Five Star Products ("Five Star") and Construction Products Research ("CPR") (collectively "Petitioners") to quash or modify a subpoena issued by the NRC Staff. The NRC Staff has responded in opposition to the Motion to Quash and Petitioners have submitted a motion for leave to file a reply with a tendered reply. We have also considered a letter from Petitioners dated September 28, 1993. After due consideration, we grant the motion for leave to file the reply, but deny the motion to quash and/or modify. We enforce the subpoena as issued. Because we held the subpoena in abeyance pending our resolution of this question, *see* Order in this Docket, August 27, 1993, we hereby establish a new response date for the subpoena of Monday, November 1, 1993, at the time and place stated in the original subpoena.

II. FACTUAL BACKGROUND

A. Petitioners' Industry-Related Activities

Five Star Products and CPR are closely related companies; they are both owned by Babcock & King, Inc., they share the same premises in Fairfield, Connecticut, and they share common officers. For example, Mr. William Babcock is the president of Babcock & King, Inc., the president of Five Star, and the vice-president of CPR. His father, Mr. H. Nash Babcock is the president of CPR and

vice-president of Five Star.

Five Star manufactures and sells grout and concrete products to the nuclear industry and has done so for about 20 years. Prior to the events that precipitated this incident, Five Star submitted these materials to CPR for testing. Following those tests, CPR issued Certificates of Conformance, certifying that the materials manufactured by Five Star meet the requirements of 10 C.F.R. Part 50, Appendix B. Under federal statute, section 206 of the Energy Reorganization Act, 42 U.S.C. § 5846, and implementing NRC regulations, 10 C.F.R. Part 21, this certification signified to nuclear power plant licensees that Five Star manufactured these materials subject to special quality requirements tailored to nuclear power plant safety applications, and subjected Five Star and CPR to safety reporting obligations to the NRC so that safety problems would be discovered and evaluated. Certified materials can be installed in "safety-related" systems without further testing by the NRC licensee that purchases them.

Based upon these certifications, several NRC licensees have purchased and installed Five Star's products in safety-related applications at various nuclear power plants in the United States over a period of years. *See* NRC Staff Response at 3 n.4. The Staff has also submitted an exhibit documenting the purchase by an NRC licensee of material manufactured by Five Star and certified by CPR as meeting the requirements of 10 C.F.R. Part 50, Appendix B, i.e., as safety-grade material. *See* NRC Staff Response at 13 n.19 and Exhibit 5.

B. The August 1992 Safety Inspection

On August 19, 1992, an NRC Staff inspection team began an unannounced inspection of Five Star. The inspection team viewed certificates of compliance signed by Five Star officials certifying that certain orders from NRC

licensees for concrete and grout were filled in compliance with 10 C.F.R. Part 50, Appendix B, and subject to 10 C.F.R. Part 21. However, the inspection team also uncovered audits of Five Star's quality assurance ("QA") program performed by nuclear power plant licensees who were customers of Five Star's products. While some of the audits approved Five Star's QA program, other audits stated that the program was not qualified under NRC regulations because Five Star would not allow the licensees access to the testing laboratory and, therefore, the qualifications of the QA program could not be verified.

The NRC inspection team requested access to the Five Star/CPR laboratory; however, access was denied on August 18th by CPR president H. Nash Babcock. Subsequently, Mr. Babcock again denied the NRC inspectors access to the laboratory on August 19th, and refused the inspectors' request for access to the laboratory technicians' notebooks. In addition, Mr. Babcock refused to allow the NRC inspectors to copy any of the records they had reviewed in the course of their inspection with the exception of the current QA manual. Finally, Mr. Babcock asked the inspectors to leave the Five Star/CPR premises before they had the opportunity to review all the documents that had originally been made available to them.

Subsequently, on August 25, 1992, Five Star informed its current customers that it was suspending its QA program immediately and that in the future it would only supply commercial-grade products, i.e., products that were not certified for safety-related uses. In response, the NRC Staff issued an Information Notice ("IN") that informed all NRC Part 50 licensees that (1) the NRC Staff had been denied access to Five Star's test laboratory and test data, and, (2) accordingly, the NRC had been unable to verify the quality of certain Five Star products used in safety-related

applications. *See* IN-92-66 (Sept. 1, 1992).[1]

C. The Holub Investigation

On January 22, 1993, CPR terminated the employment of Mr. Edward P. Holub, CPR's Director of Research. The NRC Staff has now confirmed that Mr. Holub did indeed bring safety concerns to the NRC Staff. These concerns related to the quality of the cement and grout that was (1) ordered pursuant to 10 C.F.R. Part 50, Appendix B, criteria by nuclear facilities licensed pursuant to 10 C.F.R. Part 50, and (2) tested by CPR and certified by CPR and Five Star to satisfy the requirements of 10 C.F.R. Part 50, Appendix B, subject to the requirements of 10 C.F.R. Part 21. *See generally* NRC Staff Response at 6 n.11, and 7.

On January 28, 1993, Mr. Holub filed a complaint with the Wage and Hour Division, U.S. Department of Labor ("DOL"), alleging that CPR had terminated his employment in retaliation for his providing safety concerns to the NRC on or about June 22, 1992. On April 1, 1993, the DOL Wage and Hour Division, New Haven, Connecticut, issued an Area Director's Finding, signed by the Assistant Area Director, which found that (1) Mr. Holub was engaged in protected activity within the scope and meaning of section 211 of the Energy Reorganization Act ("ERA"), 42 U.S.C. § 5851; and that (2) discrimination as defined and prohibited by that statute was a factor in the actions that comprised his complaint. Five Star and CPR have appealed that decision and have requested a hearing before a DOL Administrative Law Judge.

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[1] On September 1, 1992, the NRC Staff, with the assistance of the United States Marshals, seized documents relating to Five Star's and CPR's activities under the authority of a criminal search warrant issued by the United States District Court, District of Connecticut. The NRC Staff has since returned copies and/or originals of those documents to Five Star and/or CPR as appropriate.

As a result of the DOL Area Director's Finding, the NRC Staff, in accordance with normal procedure, issued a "chilling effect" letter to CPR on April 30, 1993. The NRC Staff requested CPR (1) to provide the reasons for Mr. Holub's termination, including any supporting documentation, and (2) to describe the actions, if any, taken or planned, to ensure that Mr. Holub's termination would not have a "chilling effect" in discouraging other employees from raising perceived safety concerns regarding Five Star products sold as meeting the requirements of 10 C.F.R. Part 50, Appendix B.

On May 6, 1993, CPR replied to the NRC Staff's letter. In its response, CPR refused to provide either the basis for Mr. Holub's termination or a description of any activities taken to prevent a "chilling effect" on its other employees. CPR based its refusal to provide the requested information on its assertion that the NRC lacked jurisdiction over CPR. On June 6, 1993, the NRC issued another "chilling effect" letter to CPR and on August 5, 1993, CPR responded, again refusing to provide the information requested by the NRC, based upon an assertion that the NRC lacked jurisdiction over CPR.

On June 21, 1993, the NRC's Office of Investigation ("OI") initiated investigation No. 1-93-027R into the circumstances of Mr. Holub's termination. On August 17, 1993, the Director of OI issued a subpoena to William N. Babcock, or the Custodian of Records for Five Star and CPR, seeking production of any documents "relating . . . to the termination of employment" of Mr. Holub "and the deliberations, discussions and communications that resulted in the decision to terminate Mr. Holub." The subpoena defined "document" to include

> any handwritten, typed, recorded, reproduced communication, memoranda (whether issued or not), draft memoranda, notes, records, letters,

> messages, bulletin board postings, working papers, reports, summaries, opinions of consultants, notices, instructions, minutes of meetings, and inter & intra office communications."

Subpoena at 1. Furthermore, the subpoena sought "any and all company policies, procedures, or requirements regarding involuntary terminations" in addition to the position descriptions of three other named employees. *Id.* Finally, the subpoena sought Mr. Holub's official personnel file, "including any disciplinary warnings or actions; as well as attendance records and compensation, salary, bonus and/or payroll records . . . ." *Id.*

On August 26, 1993, Petitioners filed their motion to quash or modify the subpoena. Petitioners argued that (1) the NRC Staff lacked jurisdiction over them and, alternatively, (2) that the subpoena sought privileged material. On August 27, 1993, we issued an order directing the NRC Staff to respond to the Motion to Quash by September 9, 1993. The NRC Staff has now responded and the matter is before us for resolution.

III. ANALYSIS

A. Applicable Statutes and Regulations

In section 161c of the Atomic Energy Act ("AEA") of 1954, as amended, Congress explicitly provided that the NRC

> is authorized . . . to make such studies and investigations, obtain such information . . . as the Commission may deem necessary and proper to assist it in exercising any authority provided in this Act, or in the administration or enforcement of this Act, or any regulations or orders issued thereunder. For

> such purposes, the Commission is authorized . . . by subpoena to require *any person* to appear and testify or appear and produce documents, or both at any designated place.

42 U.S.C. § 2201(c) (emphasis added). Section 11s of the AEA, in turn, defines "person" as "(1) any individual, corporation, partnership, firm, association, trust, estate, public or private institution, group, ... and (2) any legal successor, representative, agent or agency of the foregoing." 42 U.S.C. § 2014(s).

In section 211 of the Energy Reorganization Act ("ERA"), as amended, Congress has provided that

> [n]o employer may discharge any employee or otherwise discriminate against any employee . . . because the employee . . . (A) commenced, caused to be commenced, or is about to commence or cause to be commenced . . . a proceeding for the administration or enforcement of any requirement imposed under this Act or the Atomic Energy Act of 1954, as amended; . . . or (F) assisted or participated . . . in any manner in such a proceeding . . . or in any other action to carry out the purposes of this Act or the Atomic Energy Act of 1954, as amended.

42 U.S.C. § 5851(a)(1). An "employer," under the ERA, includes "a contractor or subcontractor of a licensee . . . ." 42 U.S.C. § 5851(a)(2)(C).

The Commission has adopted regulations implementing section 161 of the AEA and section 211 of the ERA for each area of licensing activities.[2] The regulation imple-

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[2] Section 50.7 was adopted not only "to implement section [211], 'Employee Protection' of the [ERA]," but also "to incorporate into the regulations the Commissions's authority under section 161 of the [AEA]

menting employee protection for activities under Part 50 is found at 10 C.F.R. § 50.7, which prohibits "[d]iscrimination by a Commission licensee, . . . or a contractor or subcontractor of a Commission licensee . . . ." 10 C.F.R. § 50.7(a). "[P]rotected activities include but are not limited to: (i) [p]roviding the Commission information about possible violations of requirements imposed under either [the Atomic Energy Act or Energy Reorganization Act]." 10 C.F.R. § 50.7(a)(1).

In general, an agency subpoena is enforceable if (1) it is for a proper purpose authorized by Congress; (2) the information sought is clearly relevant to that purpose and adequately described; and (3) statutory procedures are followed in the subpoena's issuance. *United States v. Powell*, 379 U.S. 48, 57-58 (1954); *United States v. Comley*, 890 F.2d 539, 541 (1st Cir. 1989).

B. Application

1. Petitioners Are a "Contractor" and a "Subcontractor" Within the Meaning of the Statute and the Regulation

Petitioners are subject to the Commission's jurisdiction under section 161 of the AEA and section 211 of the ERA.[3] Stripped of its rhetoric, Petitioners' argument that they are not subject to the NRC's jurisdiction under section 211 boils down to a simple assertion that each of the two entities, Five Star and CPR, is not a "contractor" or "subcontractor" within the meaning of section 211 of the ERA and 10 C.F.R. § 50.7(a). Instead, Petitioners argue

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to investigate an alleged unlawful discrimination against an employee and to take appropriate action . . . ." 47 Fed Reg. 30,452 (July 14, 1982). Thus, this section of our regulations is adopted under *both* section 211 of the ERA and section 161 of the AEA.

[3] Clearly, Petitioners are "persons" as defined in section 11s of the AEA and we do not read their pleadings to argue to the contrary.

that they are "suppliers" of goods and services, not "contractors."

We infer that Petitioners' argument is that the term "contractor" requires an extended relationship between the NRC licensee and the contracting party, not the individual contract that results from the filling of a purchase order. However, Petitioners cite no law whatsoever for that proposition or the proposition that a "supplier" of materials has no contract with the purchaser. Furthermore, Petitioners cite no definition of the term "contractor" in either section 211 and its legislative history or in 10 C.F.R. § 50.7 and its statement of considerations for their position. Instead, Petitioners' only citation to *any* authority in support of their argument is to the definition of a contractor for purposes of the NRC's Fitness for Duty requirements in 10 C.F.R. Part 26.

The NRC Staff argues that because Five Star entered into "contracts" with NRC licensees to provide concrete and grout that was certified to meet NRC requirements for installation in safety-related applications, Five Star is a "contractor" within the meaning of section 211 and 10 C.F.R. § 50.7. Furthermore, the Staff argues that because CPR "contracted" its services to Five Star for the purpose of enhancing Five Star's contracts with NRC licensees, CPR is a "subcontractor" within the meaning of section 211 and 10 C.F.R. § 50.7.

Neither the legislative history of section 211 (then section 210) of the ERA nor the Statement of Considerations of 10 C.F.R. § 50.7 provide any discussion or the definition of the term "contractor." Congress added section 211 to the ERA as part of the NRC's Authorization for Fiscal Year 1979, Pub. L. No. 95-601. This provision originated in the United States Senate as section 7 of the S.2584, the Senate version of the NRC's authorization legislation. The Senate Committee Report only briefly discusses the provision without discussing the term "con-

tractor." *See* S. Rep. No. 95-848 (May 15, 1978) at 29-30. Because the House version of the authorization legislation did not contain a similar provision, the Senate version was adopted as section 10 of the final legislation. *See* H.R. Conf. Rep. No. 95-1796 (Oct. 14, 1978) at 16-17. Likewise, the Statement of Considerations accompanying the adoption of 10 C.F.R. § 50.7 contains no discussion of the term "contractor." *See* 47 Fed. Reg. 30,452.

After considering this matter, we do not think that Congress could have intended to exclude employees at entities such as Five Star and CPR from the protection of section 211. The philosophy underlying the adoption of section 211 and its implementing regulations is that any employee of an NRC licensee or of a firm that deals directly or indirectly with NRC licensees on nuclear-related matters and who is in a position to have information relating to nuclear safety must feel free to come to the NRC with that information. Any attempt to "chill" this access to the NRC by harassing, intimidating, or firing employees who report conditions that could adversely affect the public health and safety violates section 211.

Quite simply, a defect in materials provided by a "supplier" or "vendor" can prove just as dangerous to public health and safety as a defect in materials provided by a "contractor" that has a more complex or long-term relationship with the NRC licensee. The risk to public health and safety—and the NRC's responsibility to protect that public health and safety—is not measured simply by the length of time in the contractual relationship between the NRC licensee and the commercial entity providing the goods and services at issue. Likewise, the protection afforded to employees who may be able to provide information to the NRC regarding threats to the public health and safety cannot be measured by the length of their employer's contract with the NRC licensee.

We believe that this is especially true where—as

here—the "supplier" offered goods and services that were certified to meet the NRC's requirements for installation in safety-related applications. Five Star offered a product for a price; and part of the product offered for purchase was the value of the certificate under Part 50, Appendix B, allowing installation in safety-related applications. Because the cement and grout purchased from Five Star carried this certificate, NRC licensees were likely to use such materials in safety-related applications without further testing or investigation.

If an employee of a firm that manufactures such material has information regarding a defect in the material or in the method of testing that material, we believe that Congress clearly intended that such an employee be protected if he or she provides that information to the NRC. Any other interpretation would be contrary to the spirit of section 211 and would create a serious gap in the protection that Congress clearly intended to create for employees in the nuclear industry and related occupations.

Moreover, we cannot accept Petitioners' distinction between a "contractor" and a "vendor"— or "supplier," to use Petitioners' words. As the Staff notes, Five Star provided materials to NRC licensees by means of a contract. True, these contracts did not require an extended relationship between Five Star and the licensee and were not performed at the location of the NRC licensee's facility. But they were still contracts in every legal sense of the word; accordingly, Five Star was a "contractor" in every legal sense of the word.[4]

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[4] In a letter to the NRC Staff, dated July 23, 1993, containing an affidavit by William N. Babcock, Petitioners asserted that the filling of a purchase order did not constitute the establishment of a contractual relationship between Five Star and the NRC licensee that purchased the materials. *See* Motion to Quash at Exhibit E, Affidavit at 3. However, it is a well-settled point of contract law that in certain situations, performance by an offeree in compliance with an offer constitutes an

Accordingly, we construe the term "contractor" in section 211 of the ERA and 10 C.F.R. § 50.7 of our regulations to include—at a minimum—employers such as "vendors" or "suppliers" that manufacture and offer for sale materials that are (1) intended for use by NRC licensees and (2) certified to meet the requirements of 10 C.F.R. Part 50, Appendix B. Five Star is such an employer and therefore, is a "contractor" for purposes of 10 C.F.R. § 50.7 and section 211 of the ERA. Therefore, the Staff has authority

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acceptance of that offer and creates a contract. *See. e.g.*, Calamari and Perillo, *Contracts* § 31 (1970; Farnsworth, *Contracts* §§ 3.14, 3.24 (1982); Restatement (Second) of the Law of Contracts § 50 (1979). *See also Himfar v. United States*, 174 Ct. Cl. 209, 355 F.2d 606 (1966); *Radium Mines, Inc. v. United States*, 139 Ct. Cl. 144, 153 F. Supp. 403 (1957). This concept has been adopted by article 2 of the Uniform Commercial Code. *See* U.C.C. § 2-206(1)(b). As one court has recently noted, a purchase order is generally presumed to be an offer inviting acceptance by the seller. *Harper Trucks, Inc. v. Allied Welding Supply*, 2 U.C.C. 835 (D. Kan. 1986).

In his Affidavit, Mr. Babcock admits that Five Star has supplied materials to NRC licensees in response to "blanket purchase orders for products." *See* Motion to Quash at Exhibit E, Affidavit at 3. The purchase orders described by Mr. Babcock constituted "offers" to buy conforming materials. Five Star apparently replied by supplying the conforming materials, *see, e.g.*, NRC Staff Response at Exhibit 5E, which constituted an "acceptance" of the offer by performance, creating a unilateral contract. Of course, if the licensee exchanged additional correspondence with Five Star, a more traditional contract may have been established. Thus, we find that Five Star entered into contractual relationships with NRC licensees when it consummated transactions in which is supplied materials to fill purchase orders issued by those NRC licensees.

The final step in the process would be for the NRC licensee to send Five Star the payment for the materials, the "consideration" for the performance of the contract. We have no doubt that if Five Star had supplied the conforming materials to the NRC licensee but the licensee refused to pay the price quoted in the purchase order, Five Star would have sued the licensee for breach of contract under the theory described above.

to investigate the circumstances of Mr. Holub's termination under section 211 of the ERA, section 161 of the AEA, and 10 C.F.R. 50.7.[5]

Having determined that Five Star is a "contractor" within the meaning of section 211 and 10 C.F.R. § 50.7, we can easily find that CPR is a "subcontractor"—even by Petitioners' own definition. Clearly, CPR maintained an ongoing contractual relationship with Five Star to provide testing services regarding the cement and grout sold to the NRC licensees. Based upon those tests, Five Star certified that the materials meet the NRC's requirements found in 10 C.F.R. Part 50, Appendix B, subject to the requirements of 10 C.F.R. Part 21. Absent CPR's testing services, Five Star could not have issued the certificates that were an integral part of the sale of its materials to NRC licensees. Therefore, CPR is a "subcontractor" to Five Star within

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[5] In their letter of September 28, 1993, Petitioners allege that the Staff did not have jurisdiction to conduct its August 1992 inspection. However, the NRC Staff clearly had jurisdiction to inspect Five Star's operations under 10 C.F.R. Part 21, which implements sections 161 and 234 of the AEA and section 206 of the ERA. Briefly, Part 21 requires that any firm that manufactures a "basic component" of a facility or activity licensed by the NRC, must report any firm that manufactures a "basic component" of a facility or activity licensed by the NRC, must report any known defects or noncompliances in that component that could create a substantial safety hazard, to the NRC as soon as those are discovered. Contrary to Petitioners' allegation, see Motion to Quash at Exhibit E, at 2, the cement and grout manufactured by Five Star and sold to NRC licensees under Part 50 Appendix B certification, are "basic components" whose failure could create a substantial safety hazard, as defined by 10 C.F.R. § 21.3(a)(1) and (2). Moreover, Five Star itself certified that its products were manufactured and sold in accordance with Part 21. Therefore, Five Star cannot now reverse itself and allege that Part 21 does not cover the manufacture of these products. Accordingly, Five Star was required to "permit duly authorized representatives of the [NRC], to inspect its records, premises, activities, and basic components as necessary to effectuate the purposes of [Part 21]." 10 C.F.R. §21.41.

the meaning of section 211 of the ERA and 10 C.F.R. § 50.7 adopted under both section 211 and section 161 of the AEA.

Petitioners raise three additional arguments that they are not subject to the NRC's jurisdiction. All are easily rejected. First, Petitioners argue that they are not subject to our jurisdiction because they now sell only "commercial-grade" grout and cement to the nuclear industry. Motion to Quash at 7. However, Mr. Holub alleges—and Petitioners do not deny—that at the time he provided information to the NRC, Five Star was selling materials to NRC licensees with CPR's certificates that the materials complied with the requirements of 10 C.F.R. Part 50, Appendix B.[6] In other words, at the time in question, Five Star was selling "safety-grade" materials, not "commercial-grade" materials.

We cannot and will not allow Five Star's subsequent act of ceasing to sell safety-grade materials to remove Mr. Holub's protection for engaging in protected activity. Otherwise, a contractor could protect itself from a charge of discrimination simply by terminating the contract when it was caught in the act of discrimination. Again, we cannot find that Congress intended such a result in enacting section 211.

Second, Petitioners argue that they are not "contractors" because they did not perform work "inside the protected area boundary . . . ." Motion to Quash at 7, *citing* 10 C.F.R. Part 26. However, that argument is clearly specious. Section 26.3 defines a class of persons who are subject to random drug testing by urinalysis, not the class

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[6] Mr. Holub alleges that he provided information to the NRC Staff on or about June 22, 1992, before Five Star abandoned its QA program. NRC Staff Response at 7. Petitioners do not argue to the contrary.

We note that Petitioners have characterized Mr. Holub's allegation as "baseless." Motion to Quash at 2. However, Mr. Holub is protected under section 211 and 10 C.F.R. § 50.7 regardless of the accuracy of his allegation.

of persons who are subject to the employee-protection provisions. We defined "contractor" narrowly in Part 26 for the specific purpose of limiting the intrusive testing for illegal drugs and only for that purpose.

More importantly, we believe that Congress could not have intended to limit the NRC's ability to protect employees from discrimination to those employees who performed jobs in the protected area, and, as before, we read no such limitation in either the ERA or its legislative history. For example, such an interpretation would mean that the NRC could not protect workers who prefabricated portions of the reactor outside a protected area. Therefore, we conclude that the fact that the Petitioners did not actually install the materials in the licensees' plants does not remove them from the coverage of either the ERA or the Commission's regulations.

Third, Petitioners rely upon *Adams v. Dole*, 927 F.2d 771 (4th Cir. 1991) *cert. denied*, 112 S. Ct. 122 (1991), for the proposition that their employees are not protected under section 211. Petitioners argue that the NRC can assert jurisdiction over them only if the NRC has jurisdiction over "any" employer and that the Fourth Circuit rejected that approach in *Adams v. Dole*. Motion to Quash at 6. We have reviewed that case and we believe that Petitioners have misread it.

In *Adams v. Dole*, the Fourth Circuit held that an employee of a DOE contractor was not protected under section 211—a decision that Congress legislatively reversed in enacting the 1992 amendments to section 211. In reaching its decision, the Fourth Circuit concluded that only employees of NRC licensees and their contractors and subcontractors were protected—not employees of DOE licensees and their contractors and subcontractors. 927 F.2d at 777. In the process, the Fourth Circuit rejected an argument raised by the Petitioners that the DOL had jurisdiction over "any" employer, regardless of the employ-

er's relationship to an NRC licensee.[7]

In this case, we do not assert jurisdiction over just "any" employer. Instead, we are today asserting jurisdiction over an employer with a long history of providing materials—including safety-related materials—to the nuclear industry and, more specifically, over acts by the employer that are directly related to its transactions with NRC licensees. Thus, we find Petitioners' citation to *Adams v. Dole* to be inapposite.

Finally, Petitioners characterize this dispute as simply "an employment matter." Motion to Quash at 9 (emphasis deleted). However, this dispute presents more than just a concern over the circumstances of Mr. Holub's termination. For approximately 20 years, Petitioners have sold products to various NRC licensees and those licensee have, in turn, presumably installed in safety-related systems, based upon certifications from Petitioners that these products met the requirements of 10 C.F.R. Part 50, Appendix B, subject to the requirements of 10 C.F.R. Part 21. The NRC Staff is naturally concerned that Petitioners may have discharged Mr. Holub in violation of his rights under the ERA and the Commission's regulations because he provided safety concerns to the NRC, and, as we noted above, the staff has jurisdiction to investigate that issue.

However, another fundamental question exists: if Petitioners discriminated against Mr. Holub for reporting safety concerns, did they discriminate against others for the same actions over the past 20 years and did such discrimination create an atmosphere in which unsafe products were sold to NRC licensees for installation in safety-related areas of nuclear power plants? In order to determine whether an investigation is needed into *that* question, the NRC Staff

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[7] At no point during its decision did the Fourth Circuit discuss the type of relationship that constituted a "contractor" for purposes of section 211.

must first make a threshold determination of whether Petitioners discriminated against Mr. Holub.

In a case almost directly on point, the Appeal Board found that the NRC Staff needed similar information related to the termination of a contractor's employee in order to determine whether to order an augmented inspection at the employer's office. *See Union Electric Co. (Callaway Plant, Units 1 and 2)*, ALAB-527, 9 NRC 126 (1979) (*"Callaway"*).

We find the *Callaway* Board's reasoning persuasive. The Staff's purpose in instituting this investigation is not to provide Mr. Holub with a remedy for the loss of his employment. Instead, the NRC Staff must determine whether to initiate an investigation into (1) whether Petitioners have taken similar actions against other workers or whether Mr. Holub's termination may have had a "chilling effect" on his co-workers and (2) in either case, are there any safety implications resulting from the employer's actions.

As the Staff points out, Petitioners products have been

> used as support for safety-related dynamic machinery installed in safety-related systems. Grout and structural concrete are also used as support for the nuclear reactor vessel, which is part of the reactor coolant pressure boundary, and structural concrete is also used in nuclear vessel containment walls, shielding, and in the walls and floor of diesel generator rooms.

Staff Response at 3 n.3.[8] Clearly, a failure by Petitioners' products in one of these safety-related systems could create a threat to the public health and safety. Such a failure could occur if Petitioners' employment practices have created a situation in which substandard material has been sold as safety-grade material. Investigating this type of potential threat to public health and safety is a purpose clearly authorized by Congress in section 161 of the AEA, independent of any authorization provided for this investigation by section 211.[9]

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[8] For example, Five Star's promotional literature states that its grout is intended for use under applied loads to support a component, structure, or piece of equipment or machinery. The grout provides the necessary structural support between the bottom of the supporting device and the top surface of its foundation, and transfers the applied support or equipment loadings (static and/or dynamic) uniformly to the foundation for which stress levels have been analyzed. Thus, shrinkage or expansion from the material's specification can cause unanalyzed stress distributions that may impact equipment operability. In addition, Five Star states that applications for its Special Grout 160 include radiation shielding, penetration closures, and nuclear reactor foundations. Finally, Five Star states that its Structural Concrete is used primarily in the repair of structural concrete. Applications include the repair of concrete columns, floors, walls, foundations, and setting of structural anchors. These products can also be used in other safety-related applications as determined by the licensee.

[9] While the NRC Staff has informed us that it has "determined that Five Star's products d[o] not constitute a safety concern[,]" NRC Staff Response at 6, we read that statement to indicate that the Staff has no safety concerns arising out of Mr. Holub's particular allegation. We do not read that response as meaning that the Staff has reviewed and validated *all* sales by Five Star to the nuclear industry over its 20-year history.

2. The Pendency of a DOL Proceeding Does Not Prevent the NRC from Acting to Protect Public Health and Safety

Petitioners argue that because Mr. Holub has initiated a proceeding before the DOL, the NRC should not pursue its own investigation into this matter as a matter of "discretion." Motion to Quash at 8-10. Specifically, Petitioners argue that Mr. Holub's sole remedy under both the ERA and NRC regulations is provided by the DOL and that the NRC's investigation would be "improvident." Motion to Quash at 9. However, this argument is clearly rebutted by both the legislative history of the ERA and our prior case law.

First, it is clear that congress intended that the NRC have the ability to conduct its own investigations during the pendency of a DOL proceeding. As the Senate floor manager of the ERA noted, "the pendency of a proceeding before the [DOL] need not delay any action by the Commission to carry out the purposes of the Atomic Energy Act of 1954." 124 Cong. Rec. 29,771 (1978) (remarks of Senator Hart). Reflecting this view, the Memorandum of Understanding ("MOU") between the NRC and the DOL clearly provides that the NRC can take action independent of the status of the DOL's proceedings. *See* Memorandum of Understanding Between the NRC and the Department of Labor, 47 Fed. Reg. 54,585 (Dec. 3, 1982).

As we noted above, NRC licensees have purchased cement and grout from Petitioners for approximately 20 years. These licensees have installed these materials in safety-related systems, relying on the certification that the purchased materials met the NRC's requirements for safety-grade materials. The Staff has a legitimate concern that Petitioners' employment practices may have allowed substandard materials to have been sold as safety-grade materials. It is clear that Congress did not intend that the agency await the conclusion of a lengthy DOL hearing

process before investigating such a safety-related issue.

Second, the *Callaway* decision speaks directly to this issue. In that case the Appeal Board held the Staff had jurisdiction to investigate and take action against contractors who retaliate against their employees who bring safety concerns to the NRC, even if that employee has either contractual or statutory remedies for his discharge. *See generally Callaway*, 9 NRC at 132-39. As the *Callaway* Board pointed out, the remedies provided by the arbitrator in that case—like the DOL in this case—will only assist the employee as an individual. Those remedies will not assist the NRC in performing the duties assigned it by Congress; protecting the rights of workers in the nuclear industry and ensuring the free flow of information to the NRC. *E.g.*, *Callaway*, 9 NRC at 138-39. Accordingly, the NRC Staff need not await the conclusion of Mr. Holub's DOL proceedings before conducting its investigation.[10]

3. Petitioners Have Failed to Demonstrate That the Subpoena Should Be Modified

In their Motion Quash, Petitioners urge that if we find that we have jurisdiction over them in this matter, that we should in any event modify the subpoena. Motion to Quash at 11. First, Petitioners ask that the Staff be directed to tell them what documents it already has so they can identify the documents they need to produce. The Staff has now done exactly as requested by Petitioners: it has informed the Petitioners that it (the Staff) has no docu-

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[10] Petitioners argue that the NRC recently opposed efforts to require simultaneous investigations by both the DOL and the NRC. That statement is true; the Commission opposes any effort to *require* simultaneous investigations. However, the Commission has always maintained that it has the *discretion* to conduct a simultaneous investigation in an "appropriate" case. The NRC Staff has determined that this case is an "appropriate" case.

ments that are requested in the subpoena. *See* NRC Staff Response at 18.

Second, Petitioners ask that the Commission modify the subpoena to eliminate the requirement to produce any documents covered by the attorney-client privilege or the work-product privilege. Motion to Quash as 11-12. We will not take that step at this time. The normal practice in discovery is for the party opposing discovery to identify the documents for which a privilege is claimed (as the Staff notes, Response at 18-19, by date, author, addressee, and reason for claiming the privilege) and submit that list to the Court—or in this case, to the Commission—for an adjudication of those claims if the parties cannot reach an agreement among themselves. We will not rule on such claims in the abstract.[11]

4. The Involvement of the United States Attorney

Finally, Petitioners claim that the United States Attorney for the District of Connecticut appears to be involved in this case on behalf of the NRC in some manner and imply that such involvement should be grounds to quash the subpoena. We disagree. The Staff has not referred this case to the U.S. Attorney and says that it knows of no such involvement. NRC Staff Response at 20. If the Petitioners wish to understand the involvement—if any—of the Office of the U.S. Attorney for the District of Connecticut, they may communicate directly with that Office. This allegation is not grounds to quash the subpoena.

IV. SUMMARY

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[11] In their tendered reply, Petitioners appear to have abandoned this argument. Reply at 4 n.4.

As we have shown above, the subpoena before us has been issued in the course of an investigation to determine if Petitioners have violated the Commission's regulations issued pursuant to section 161 of the AEA and section 211 of the ERA and to determine if any possible safety-related problems exist at NRC licensed facilities. The information sought is clearly relevant to that investigation, clearly described, and Petitioners have not alleged any failure to follow statutory procedures in issuing the subpoena. Thus, we find no reason to quash the subpoena. *United States v. Powell, supra*; *United States v. Comley, supra*. Accordingly, we deny the motion to quash of modify the subpoena and establish a new enforcement date for the subpoena of November 1, 1993.

It is so ORDERED.[12]

For the Commission

SAMUEL J. CHILK
Secretary of the Commission

Dated at Rockville, Maryland,
this day of 21st October 1993.

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[12] Commissioner Remick was not present for the affirmation of this Order: if he had been present, he would have approved it.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA,	)	
	)	
PETITIONER,	)	
	)	
v.	)	Case No.
	)	3:94MC112 (AHN)
	)	
CONSTRUCTION PRODUCTS RESEARCH CO, FIVE STAR PRODUCTS AND H. NASH BABCOCK,	)	
	)	
RESPONDENTS.	)	

RECOMMENDED RULING ON
PETITION TO ENFORCE SUBPOENA

The Nuclear Regulatory Commission (the "NRC") petitions for an order, pursuant to 42 U.S.C. § 2281, enforcing an administrative subpoena *duces tecum* issued under 42 U.S.C. § 2201(c). [Doc. #2]. The subpoena seeks corporate documents from respondents, Construction Products Research Co. ("CPR"), Five Star Products, Inc. ("FSP"), and H. Nash Babcock ("Babcock").[1] The documents are sought in connection with an investigation into the safety implications of the respondents' possible violations of statutes and NRC regulations. The respondents challenge the subpoena on the grounds that the NRC lacks jurisdiction over them and their employment practices and

[1] The subpoena was issued to Babcock in his capacity as Custodian of Records of CPR. It does not seek any of Babcock's personal records.

the subpoena is not, therefore, issued pursuant to a lawful purpose. For the following reasons, the respondents should comply with the subpoena.

FACTUAL AND PROCEDURAL BACKGROUND

The NRC is an independent agency created to regulate the use of atomic energy and safety pursuant to the Atomic Energy Act ("AEA") of 1954, as amended, 42 U.S.C. §§ 2201 *et seq.*, and the Energy Reorganization Act ("ERA") of 1974, as amended, 42 U.S.C. §§ 5801 *et. seq.* To assist it in exercising its responsibilities, the NRC is authorized to conduct investigations and issue subpoenas which it deems necessary. 42 U.S.C. § 2201(c).

FSP and CPR are closely-related, family-owned businesses that operate out of the same facility in Fairfield, Connecticut. FSP manufactures grout and structural concrete products used in the construction and repair of nuclear power plants. During the time period at issue, CPR provided testing services to FSP as part of FSP's quality assurance ("QA") program. Because FSP operated pursuant to an approved QA program, it was able to certify to NRC licensees that its products met NRC safety regulations and the licensees were able to use the products in safety-related systems at nuclear power plants without further testing.

In June 1992, an employee of CPR, Edward Holub, notified the NRC that he believed improper procedures were being used to test FSP's products. Shortly thereafter, NRC inspectors visited the respondents' facility but were denied access to the testing laboratory. As a result, the inspectors contacted the U.S. Attorney's Office for assistance and obtained a judicial search warrant authorizing a search of the respondents' facility. NRC officials, assisted by U.S. Marshals, executed the warrant on September 1, 1992

and seized numerous documents relating to product testing.[2]

Approximately four months later, on January 22, 1993, CPR terminated Holub's employment. Holub filed an employment discrimination claim with the United States Department of Labor ("DOL"), seeking reinstatement and damages pursuant to 42 U.S.C. § 5851 (the "Whistleblower Protection Statute") because he claimed he was terminated in retaliation for whistleblowing. The DOL conducted an investigation and found that Holub had engaged in protected activity and was illegally terminated. Respondents appealed the DOL's decision. The appeal is still pending.

The NRC instituted two separate investigations of respondents. The first one was begun after Holub's termination and concerns the safety of respondents' workplace and the products they sold to NRC licensees. In this investigation the NRC staff made a preliminary determination that a majority of Holub's allegations were correct but did not raise serious safety concerns requiring immediate corrective action. This investigation is ongoing. The second investigation was begun after the DOL determined that Holub's termination violated the Whistleblower Protection Statute. This investigation concerns the safety implications of Holub's termination, including the chilling effect the termination might have had on other employees. In connection with this second investigation, the NRC Office of Investigations issued the subpoena at issue here, which directs respondents to produce 1) documents related to Holub's termination; 2) their policies and procedures regarding involuntary terminations; 3) the job descriptions of Holub and two other employees; and 4) Holub's official personnel file. The respondents moved to quash the subpoena before the NRC. On October 21, 1993, the NRC issued

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[2] A criminal investigation begun by the U.S. Attorney at that time was concluded in January 1995 without any charges being filed.

a memorandum and order denying the motion to quash and upholding the subpoena. This petition was filed after respondents advised the NRC that they would not comply with the subpoena.

STANDARD OF REVIEW

The Supreme Court has made it clear that the role of the district court in a proceeding to enforce an administrative subpoena is a strictly limited one. The court may only consider whether the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant to the inquiry. *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950); *Oklahoma Press Publishing Co., v. Walling*, 327 U.S. 186 (1946). To establish that the subpoena serves a legitimate purpose, the agency need only show that the subpoena seeks information about a matter or issue that Congress authorized the agency to investigate. *Endicott Johnson Corp. v. Perkins*, 317 U.S. 501, 508 (1943). Once the agency makes this *prima facie* showing, the burden shifts to respondents to show that enforcement of the subpoena would abuse the court's process. *United States v. Powell*, 379 U.S. 48, 58 (1964).

Contrary to the respondents' assertion, in determining whether the subpoena serves a legitimate purpose the court is not confined to examining the record made before the agency. *Dow Chemical Co. v. Allen*, 672 F.2d 1262, 1267 (7th Cir. 1982). Rather, the court can inquire into all relevant matters, unlimited by the scope of the agency's inquiry. *United States v. Exxon Corp.*, 628 F.2d 70, 77 (D.C. Cir.), *cert. denied*, 446 U.S. 964 (1980).

While the court's function is "neither minor nor ministerial," the scope of issues which may be litigated in an enforcement action is narrow. *FTC v. Texaco, Inc.*, 555 F.2d 862, 872 (D.C. Cir.) (quoting *Oklahoma Press Publish-*

ing Co. v. Walling, 327 U.S. at 217 n.57), *cert denied*, 431 U.S. 974, *reh'g denied*, 434 U.S. 883 (1977). The agency is not required to establish its jurisdiction before obtaining enforcement of a subpoena. *EEOC v. Port of Seattle*, 521 F.2d 431, 434, 436 (9th Cir. 1975); *SEC v. Savage*, 513 F.2d 188, 189 (7th Cir. 1975). In a subpoena enforcement proceeding, the district court lacks authority to determine whether the subpoenaed party is within the agency's jurisdiction or covered by a statute it administers. *Endicott Johnson Corp. v. Perkins*, 317 U.S. at 509.

Substantive issues, such as the agency's jurisdiction, which may be raised in defense against an administrative complaint are premature in an enforcement proceeding. *FTC v. Texaco, Inc.*, 555 F.2d at 879. Indeed, in *Morton Salt*, the Supreme Court acknowledged that the administrative "power of inquisition" is analogous to that of the Grand Jury, which does not depend on the existence of a case or controversy for its power to get evidence but can investigate "merely on suspicion that the law is being violated, or even just because it wants assurance that it is not." *United States v. Morton Salt Co.*, 338 U.S. at 642-43. In fact, in *Morton Salt*, the Court noted that even if the agency request is motivated by "nothing more than official curiosity," a subpoena is enforceable because agencies have a legitimate interest in seeing that the law and the public interest are maintained. *SEC v. Brigadoon Scotch Dist. Co.*, 480 F.2d 1047, 1053 (2d Cir. 1973) (citing *United States v. Morton Salt Co.*, 338 U.S. at 652), *cert. denied*, 415 U.S. 915 (1974).

DISCUSSION

The NRC asserts that it is investigating respondents to determine whether their treatment of a whistleblower poses a threat to public health and safety by discouraging would-be whistleblowers from coming forward and thereby

increasing the likelihood that safety defects will escape detection. The NRC articulates three sources of statutory authority to support the investigation: 1) its authority to safeguard public health and safety under 42 U.S.C. § 2012(e) and 10 C.F.R. § 1.11(b)[3] which encompasses the safety implications of respondents' anti-whistleblowing activity; 2) its power to investigate and take enforcement action against employers who violate the Whistleblower Protection Statute and the NRC's employee protection rule, 42 U.S.C. § 5851 and 10 C.F.R. § 50.7,[4] to determine if the anti-whistleblower activity threatens public health and safety; and 3) its authority to investigate the safety implications of a violation of 42 U.S.C. § 5846 and 10 C.F.R. Part 21, which impose a duty on suppliers of basic components to notify the NRC if they supplied products that did not comply with NRC safety regulations.[5]

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[3] 42 U.S.C. § 2012(e) provides in part that nuclear material, production facilities and utilization facilities are affected with a public interest and regulation of the production and utilization of atomic energy and the facilities used in connection therewith is necessary in the national interest to assure security and to protect the health and safety of the public. 10 C.F.R. § 1.11(b) provides, in part, that the NRC is responsible for protecting public health and safety and is authorized to conduct inspections, investigations, and enforcement proceedings.

[4] 42 U.S.C. § 5851 provides that "[n]o employer, including [an NRC licensee, or a contractor or subcontractor of a licensee] may discharge any employee or otherwise discriminate against any employee who . . . '(1) commenced [or caused to commence] . . . a proceeding for administration or enforcement of any requirement imposed under the [AEA]'".

NRC regulation 10 C.F.R. § 50.7, which implements § 5851 prohibits discrimination by an NRC licensee, permittee, or a contractor or subcontractor from engaging in certain protected activities, including providing the NRC information about possible violations of NRC statutes and regulations.

[5] 42 U.S.C. § 5846(a) provides, in part, that any director or officer of a firm supplying components to an NRC licensee who learns that its products contain a defect which could create a substantial safety hazard must notify the NRC of the defect.

Respondents maintain that the NRC does not have jurisdiction over them or their employment practices under any of the statutes relied on by the NRC. They claim that they are merely suppliers of products and that the Whistleblower Protection Statute only gives the NRC jurisdiction over "employers" who are defined as licensees, contractors and subcontractors. In addition, they maintain that the Whistleblower Protection Statute vests in the DOL exclusive jurisdiction to investigate Holub's termination and to take enforcement action. Respondents also argue that 42 U.S.C. § 5846(a) does not give the NRC jurisdiction to investigate their "employment practices" because this statute merely imposes a duty on suppliers of basic components to notify the NRC if they sell any products which do not meet safety requirements. Finally, respondents claim that the authority to conduct investigations to safeguard public health and safety pursuant to 42 U.S.C. § 2012(e) does not support the subpoena because the information the NRC seeks relates solely to their "employment practices" and has nothing to do with safety.

Respondents' jurisdictional challenges to the lawfulness of the subpoena are not properly before the court in this summary enforcement proceeding. *E.g.*, *Endicott Johnson Corp. v. Perkins*, 317 U.S. at 509 & n.11. The respondents can litigate the issue of the NRC's jurisdiction over them if and when the NRC brings an enforcement proceeding. *Newmark & Co. v. Wirtz*, 330 F.2d 576, 578 (2d Cir. 1964). The question of the inclusion of a particular person or entity within the coverage of a regulatory statute is generally for initial determination by an agency, subject

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A vendor or supplier who certifies its products were manufactured and sold in accordance with 10 C.F.R. Part 21 is required to "permit duly authorized representatives of the [NRC] to inspect its records, premises, activities, and basic components as necessary to effectuate the purposes of [Part 21]." 10 C.F.R. § 21.41.

to review on direct appeal, rather than for a district court whose jurisdiction is invoked to enforce an administrative subpoena. *SEC v. Wall Street Transcript Corp.*, 422 F.2d 1371, 1375 (2d Cir.), *cert. denied*, 398 U.S. 958 (1970). As the Second Circuit observed, the *Morton Salt* Court found that administrative agencies have "a relatively unchecked administrative subpoena power into corporate affairs." *In re McVane*, No. 94-6118, 1995 U.S. App. LEXIS 1001, at *22 (2nd Cir. Jan. 12, 1995). An agency vested with broad investigatory powers[6] is not limited to obtaining information from persons over whom it may exercise regulatory jurisdiction. Rather, it may subpoena any person from whom it can obtain documents and information which are relevant and material to its inquiry. *See FTC v. Rockefeller*, 441 F. Supp. 234, 240 (S.D.N.Y. 1977), *aff'd*, 591 F.2d 182 (2d Cir. 1979); *FCC v. Cohn*, 154 F. Supp. 899, 906 (S.D.N.Y. 1957). Accordingly, at this juncture, the court's role is simply to determine whether the subpoena was issued in

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[6] Congress vested the NRC with broad investigatory powers to assist it in carrying out its responsibilities. Specifically, the NRC is authorized to:

> make such studies and investigations, obtain such information, . . . as the [NRC] may deem necessary or proper to assist it in exercising [its authority] . . . For such purposes the [NRC] is authorized to administer oaths and affirmations, and by subpoena to require any person to appear and testify, or to appear and produce documents, or both, at any designated place.

§ 42 U.S.C. § 2201(c). "Person" is defined as "any . . . individual, corporation, partnership, firm" . . . 42 U.S.C. § 2014(s). This statute, however, only authorizes investigations of matters within the NRC's statutory authority and does not independently convey jurisdiction if it is otherwise lacking. *In re Sealed Case*, 1994 WL 709302, at *5 (D.C. Cir. December 23, 1994).

furtherance of a legitimate agency purpose.[7] The NRC must show that the inquiry or investigation which the subpoena advances, not the party to whom it is directed, is within its authority. *ICC v. Gould*, 629 F.2d 847 (3d Cir. 1980), *cert. denied*, 449 U.S. 1077 (1981).

The question of the agency's authority to investigate respondents' termination of Holub was decided by the Commission in its ruling on the respondents' motion to quash the subpoena. The Commission determined that it had jurisdiction to investigate Holub's termination under 42 U.S.C. § 5851 and 10 C.F.R. § 50.7 because the respondents are employers within the meaning of the statute. The Commission concluded that the subpoena was authorized to further the NRC's investigation of Holub's termination to determine if respondents have a pattern of anti-whistleblower activity and, if so, whether their practices raise safety concerns which may threaten public health and safety. *In re Five Star Products*, 38 NRC 169 (1993).

It is not for this court to review the agency's determination that respondents are subject to NRC's statutory jurisdiction. As previously discussed, if the NRC seeks to exercise regulatory control over respondents' business practices at some future date, respondents will then be entitled to a full hearing on their jurisdictional contentions. *SEC v. Brigadoon Scotch Dist. Co.*, 480 F.2d at 1052-53. Thus, the only issue before the court is whether the NRC has authority to subpoena documents from respondents, *not* whether the NRC has jurisdiction over respondents. *FTC v. Rockefeller*, 441 F. Supp. at 239.

The court finds that the NRC is authorized to subpoena documents from respondents in aid of a lawful

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[7] The court is also authorized in an enforcement proceeding to determine whether the subpoena is reasonably relevant to the stated purpose and whether it is too indefinite. Respondents do not, however, challenge the subpoena on either of these grounds.

investigation into the safety implications of respondents' alleged retaliatory discharge of Holub for engaging in protected activity. The legitimate safety concerns of the NRC include the possible chilling effect which Holub's retaliatory discharge might have on the willingness of respondents' other employees to bring safety concerns to the NRC's attention and the resulting effect on the safety of respondents' products that were sold to NRC licensees.

The NRC is not acting to obtain a private remedy for Holub. Indeed, pursuant to *Norman v. Niagara Mohawk Power Corp.*, 873 F.2d 634 (2d Cir. 1989), Holub's exclusive personal remedy lies with the DOL.[8] Rather, the NRC is acting in the public's interest to insure the public health and safety. Respondents have sold various grout and cement products to NRC licensees, who installed them in safety-related systems in nuclear power plants without further testing based on respondents' certification that the products met the NRC's safety standards. In light of the DOL finding that respondents terminated Holub for raising safety concerns, the NRC has a lawful right to investigate whether respondents did the same to other employees and whether retaliation against Holub or others created an atmosphere in which unsafe products could be sold to NRC licensees for use in nuclear power plants. This is a legitimate inquiry into activities prohibited by Congress in 42 U.S.C. § 5851(c) which raise public health and safety concerns entrusted to the NRC by the AEA and supporting regulations.

Finally, there is no merit to the respondents' claim that the subpoena is not enforceable because it is overbroad

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[8] Holub is seeking a private remedy before the DOL in accordance with 42 U.S.C. § 5851. The pendency of a proceeding before the DOL does not delay or prevent the NRC from taking independent action in the public's interest. Mem. of Understanding Between the NRC and the DOL, 47 Fed. Reg. 54,585 (December 3, 1982).

in that it requires the production of documents which are already in the NRC's possession or are privileged.

Broadness and privilege objections are not sufficient grounds to refuse enforcement of a subpoena. *SEC v. Texaco*, 555 F.2d at 882. Courts are reluctant to modify an overbroad subpoena unless compliance threatens to unduly disrupt or seriously hinder normal operations of a business. *Id.* The respondents have not alleged that production of the documents would unduly burden their business operation. They have also not substantiated their allegation that the NRC already has the documents in its possession. Because the respondents have not met their burden of establishing that the subpoena is overly broad, the court does not find grounds for modification on the present record.

In addition, while respondents have made a blanket assertion of privilege, they did not brief the issue nor did they properly invoke the privilege. Not all communications between attorney and client are privileged. A party seeking to invoke the privilege should provide the court with an explanation of how the information in each of the subpoenaed documents fits within the privilege. *See Clark v. American Commercial Nat. Bank*, 947 F.2d 127 (9th Cir. 1992). The respondents have failed to particularize their assertion of the privilege and have not sustained their burden of establishing that the privilege applies.

CONCLUSION

For the foregoing reasons, the Petition for summary enforcement of administrative subpoena [doc. #2] is granted. The parties may seek the district judge's review of this recommendation. *See* 28 U.S.C. § 636(b) (written objections to ruling must be filed within ten days after service of same); F.R. Civ.P. 6(a), 6(e) & 72; Rule 2 of the Local Rules for United States Magistrate Judges, United States District Court for the District of Connecticut; *Small*

v. Secretary of Health & Human Serv., 892 F.2d 15, 16 (2d Cir. 1989) (failure to file timely objection to Magistrate Judge's recommended ruling may preclude further appeal to Second Circuit).

Dated at Bridgeport, Connecticut, this 17th day of February, 1995.

HOLLY B. FITZSIMMONS
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT
[Notation Order entered on Apr. 4, 1995]

4/3/95: After review and over objection, the Magistrate Judge's Recommended Ruling is approved, adopted & ratified. SO ORDERED.

Alan H. Nevas, U.S.D.J.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

GEORGE LANGE III, CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 22 day of March one thousand nine hundred and ninety-six.

USA

v Dkt No 95-6067

Construction Product

A petition for rehearing containing a suggestion that the action be *reheard en banc* having been filed herein by the appellants Construction Products Research, Inc., Five Star Products Inc., and H. Nash Babcock.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing *en banc* has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

GEORGE LANGE III, Clerk

By:
Beth J. Meador,
Administrative Attorney

STATUTORY PROVISIONS

Atomic Energy Act of 1954, as amended

§ 161, 42 U.S.C. § 2201 (1994)

General duties of the Commission

In the performance of its functions the Commission is authorized to—

(c) make such studies and investigations, obtain such information, and hold such meetings or hearings as the Commission may deem necessary or proper to assist it in exercising any authority provided in this chapter, or in the administration or enforcement of this chapter, or any regulations or orders issued thereunder. For such purposes the Commission is authorized to administer oaths and affirmations, and by subpena to require any person to appear and testify, or to appear and produce documents, or both, at any designated place. Witnesses subpoenaed under this subsection shall be paid the same fees and mileage as are paid witnesses in the district courts of the United States;

* * *

Energy Reorganization Act of 1974, as amended

§ 206, 42 U.S.C. § 5846 (1994)

Compliance with safety regulations

(a) Notification to Commission of noncompliance

Any individual director, or responsible officer of a firm constructing, owning, operating, or supplying the components of any facility or activity which is licensed or otherwise regulated pursuant to the Atomic Energy Act of 1954 as amended [42 U.S.C. § 2011 *et seq.*], or pursuant to this chapter, who obtains information reasonably indicating that such facility or activity or basic components supplied to such facility or activity—

> (1) fails to comply with the Atomic Energy Act of 1954, as amended, or any applicable rule, regulation, order, or license of the Commission relating to substantial safety hazards, or
>
> (2) contains a defect which could create a substantial safety hazard, as defined by regulations which the Commission shall promulgate,

shall immediately notify the Commission of such failure to comply, or of such defect, unless such person has actual knowledge that the Commission has been adequately informed of such defect or failure to comply.

(b) Penalty for failure to notify

Any person who knowingly and consciously fails to provide the notice required by subsection (a) of this section shall be subject to a civil penalty in an amount equal to the amount provided by section 234 of the Atomic Energy Act of 1954, as amended [42 U.S.C. § 2282].

(c) Posting of requirements

The requirements of this section shall be prominently posted on the premises of any facility licensed or otherwise regulated pursuant to the Atomic Energy Act of 1954,

as amended [42 U.S.C. § 2011 et seq.].

(d) Inspection and enforcement

The Commission is authorized to conduct such reasonable inspections and other enforcement activities as needed to insure compliance with the provisions of this section.

§ 211 (as renumbered)
42 U.S.C. § 5851 (1994)

Employee protection

(a) Discrimination against employee

(1) No employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee)—

(A) notified his employer of an alleged violation of this chapter or the Atomic Energy Act of 1954 (42 U.S.C. 2011 *et seq.*);

(B) refused to engage in any practice made unlawful by this chapter or the Atomic Energy Act of 1954 [42 U.S.C. §2011 *et seq.*], if the employee has identified the alleged illegality to the employer;

(C) testified before Congress or at any Federal or State proceeding regarding any provision (or proposed provision) of this chapter or the Atomic Energy Act of 1954 [42 U.S.C. § 2011 *et seq.*];

(D) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter or the Atomic Energy Act of 1954, as amended [42 U.S.C. § 2011 *et seq.*], or a proceeding for the administration or enforcement of any requirement imposed under this chapter or the Atomic Energy Act of 1954, as amended;

(E) testified or is about to testify in any such proceeding or;

(F) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other manner in such a proceeding or in any other action to carry out the purposes of this chapter or the Atomic Energy Act of 1954, as amended [42 U.S.C. § 2011 *et seq.*].

(2) For purposes of this section, the term "employer" includes—

(A) a licensee of the Commission or of an agreement State under section 274 of the Atomic Energy Act of 1954 (42 U.S.C. 2021);

(B) an applicant for a license from the Commission or such an agreement State;

(C) a contractor or subcontractor of such a licensee or applicant; and

(D) a contractor or subcontractor of the Department of Energy that is indemnified by the Department under section 170 d. of the Atomic Energy Act of 1954 (42 U.S.C. 2210(d)), but such term shall not include any contractor or subcontrac-

tor covered by Executive Order No. 12344.

(b) Complaint, filing and notification

(1) Any employee who believes that he has been discharged or otherwise discriminated against by any person in violation of subsection (a) of this section may, within 180 days after such violation occurs, file (or have any person file on his behalf) a complaint with the Secretary of Labor (in this section referred to as the "Secretary") alleging such discharge or discrimination. Upon receipt of such a complaint, the Secretary shall notify the person named in the complaint of the filing of the complaint, the Commission, and the Department of Energy.

(2)(A) Upon receipt of a complaint filed under paragraph (1), the Secretary shall conduct an investigation of the violation alleged in the complaint. Within thirty days of the receipt of such complaint, the Secretary shall complete such investigation and shall notify in writing the complainant (and any person acting in his behalf) and the person alleged to have committed such violation of the results of the investigation conducted pursuant to this subparagraph. Within ninety days of the receipt of such complaint the Secretary shall, unless the proceeding on the complaint is terminated by the Secretary on the basis of a settlement entered into by the Secretary and the person alleged to have committed such violation, issue an order either providing the relief prescribed by subparagraph (B) or denying the complaint. An order of the Secretary shall be made on the record after notice and opportunity for public hearing. Upon the conclusion of such hearing and the issuance of a recommended decision that the complaint has merit, the Secretary shall issue a preliminary order providing the relief prescribed in subparagraph (B), but may not order compensatory damages pending a final order. The

Secretary may not enter into a settlement terminating a proceeding on a complaint without the participation and consent of the complainant.

(B) If, in response to a complaint filed under paragraph (1), the Secretary determines that a violation of subsection (a) of this section has occurred, the Secretary shall order the person who committed such violation to (i) take affirmative action to abate the violation, and (ii) reinstate the complainant to his former position together with the compensation (including back pay), terms, conditions, and privileges of his employment, and the Secretary may order such person to provide compensatory damages to the complainant. If an order is issued under this paragraph, the Secretary, at the request of the complainant shall assess against the person against whom the order is issued a sum equal to the aggregate amount of all costs and expenses (including attorneys' and expert witness fees) reasonably incurred, as determined by the Secretary, by the complainant for, or in connection with, the bringing of the complaint upon which the order was issued.

(3)(A) The Secretary shall dismiss a complaint filed under paragraph (1), and shall not conduct the investigation required under paragraph (2), unless the complainant has made a *prima facie* showing that any behavior described in subparagraphs (A) through (F) of subsection (a)(1) of this section was a contributing factor in the unfavorable personnel action alleged in the complaint.

(B) Notwithstanding a finding by the Secretary that the complainant has made the showing required by subparagraph (A), no investigation required under paragraph (2) shall be conducted if the employer demonstrates, by clear and convincing evidence, that it would have taken the same unfavorable personnel action in the absence of such

behavior.

(C) The Secretary may determine that a violation of subsection (a) of this section has occurred only if the complainant has demonstrated that any behavior described in subparagraphs (A) through (F) of subsection (a)(1) of this section was a contributing factor in the unfavorable personnel action alleged in the complaint.

(D) Relief may not be ordered under paragraph (2) if the employer demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of such behavior.

(c) Review

(1) Any person adversely affected or aggrieved by an order issued under subsection (b) of this section may obtain review of the order in the United States court of appeals for the circuit in which the violation, with respect to which the order was issued, allegedly occurred. The petition for review must be filed within sixty days from the issuance of the Secretary's order. Review shall conform to chapter 7 of Title 5. The commencement of proceedings under this subparagraph shall not, unless ordered by the court, operate as a stay of the Secretary's order.

(2) An order of the Secretary with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in any criminal or other civil proceeding.

(d) Jurisdiction

Whenever a person has failed to comply with an order issued under subsection (b)(2) of this section, the

Secretary may file a civil action in the United States district court for the district in which the violation was found to occur to enforce such order. In actions brought under this subsection, the district courts shall have jurisdiction to grant all appropriate relief including, but not limited to, injunctive relief, compensatory, and exemplary damages.

(e) Commencement of action

(1) Any person on whose behalf an order was issued under paragraph (2) of subsection (b) of this section may commence a civil action against the person to whom such order was issued to require compliance with such order. The appropriate United States district court shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such order.

(2) The court, in issuing any final order under this subsection, may award costs of litigation (including reasonable attorney and expert witness fees) to any party whenever the court determines such award is appropriate.

(f) Enforcement

Any nondiscretionary duty imposed by this section shall be enforceable in a mandamus proceeding brought under section 1361 of Title 28.

(g) Deliberate violations

Subsection (a) of this section shall not apply with respect to any employee who, acting without direction from his or her employer (or the employer's agent), deliberately causes a violation of any requirement of this chapter or of the Atomic Energy Act of 1954, as amended [42 U.S.C. § 2011 *et seq.*].

(h) Nonpreemption

This section may not be construed to expand, diminish, or otherwise affect any right otherwise available to an employee under Federal or State law to redress the employee's discharge or other discriminatory action taken by the employer against the employee.

(i) Posting requirement

The provisions of this section shall be prominently posted in any place of employment to which this section applies.

(j) Investigation of allegations

(1) The Commission or the Department of Energy shall not delay taking appropriate action with respect to an allegation of a substantial safety hazard on the basis of—

(A) the filing of a complaint under subsection (b)(1) of this section arising from such allegation; or

(B) any investigation by the Secretary, or other action, under this section in response to such complaint.

(2) A determination by the Secretary under this section that a violation of subsection (a) of this section has not occurred shall not be considered by the Commission or the Department of Energy in its determination of whether a substantial safety hazard exists.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
OFFICE OF INVESTIGATIONS

THE MATTER OF: NRC Investigation
CASE NO: 1-93-027R

TO: William N. Babcock (or Custodian of Records)
Five Star Products/Construction Products Research
435 Stillson Road
Fairfield, CT 06430

YOU ARE HEREBY COMMANDED, pursuant to Section 161(c) of the Atomic Energy Act of 1954, as amended, to appear at the Five Star Products/Construction Products Research, 435 Stillson Road, Fairfield, CT 06430, on the 2nd day of September, 1993, at 10:00 AM, and to provide the NRC with: any and all documents in your custody, control, or possession relating in any way whatsoever to the termination of employment of Edward P. HOLUB on January 22, 1993, and the deliberations, discussions and communications that resulted in the decision to terminate Mr. HOLUB. The term document means any handwritten, typed, recorded, reproduced communication, memoranda (whether issued or not), draft memoranda, notes, records, letters, messages, bulletin board postings, working papers, reports, summaries, opinions of consultants, notices, instructions, minutes of meetings, and inter & intra office communication.

Additionally, you are commanded to provide the NRC with any and all company policies, procedures or requirements regarding involuntary terminations, along with position descriptions of jobs that were held by Mr. HOLUB, Stanley NOWACKI, and Richard GRABOWSKI for the period of 1987 to January 22, 1993, including, but not limited to, the

duties and responsibilities of those positions, and the expectations associated therewith.

Finally, you are commanded to provide the NRC with the entire official personnel file for HOLUB, including any disciplinary warnings or actions; as well as attendance records and compensation, salary, bonus and/or payroll records concerning his employment during the period from 1987 to January 22, 1993.

BY ORDER OF THE DIRECTOR
OFFICE OF INVESTIGATIONS

By_____
Ben B. Hayes
Date August 17, 1993

Requested by:

Ernest P. Wilson, Investigator
Office of Investigations
Field Office, Region I
475 Allendale Road
King of Prussia, PA 19405
Phone: (215) 337-5305

On motion made promptly, and in any event at or before the time specified in the subpoena for compliance by the person to whom the subpoena is directed, and on notice to the party at whose instance the subpoena was issued, the Commission may (1) quash or modify the subpoena if it is unreasonable or requires evidence not relevant to any matter in issue, or (2) condition denial of the motion on just and reasonable terms. Such motion should be directed to the Secretary of the Commission, Washington, DC 20555. Failure to comply with the terms of this subpoena may result in the Commission's seeking judicial enforcement of the subpoena pursuant to Section 233 of the Atomic Energy Act of 1954, as amended, 42 U.S.C. 2281.

Five Star Products, Inc. and Construction Products Research, Fairfield, Connecticut, and H. Nash Babcock; Stipulation Between Nuclear Regulatory Commission and Five Star Products, Inc., Construction Products Research, Inc., and H. Nash Babcock.

Representatives of the Nuclear Regulatory Commission ("NRC") and Five Star Products, Inc., Construction Products Research, Inc. ("the Companies"), and H. Nash Babcock have met and have decided to resolve this matter as addressed in this Stipulation as set out below.

Stipulation

The NRC, the Companies, and H. Nash Babcock stipulate to the following:

1. The Companies and H. Nash Babcock are free to sell commercial-grade products to anyone in the nuclear industry, as they now do. "Commercial-grade" is defined as in 10 C.F.R. Part 21 of the Commission's regulations. Five Star Products' commercial-grade materials may be used in any safety-related applications provided that NRC licensees properly dedicate the materials for use as basic components and verify their suitability for the applications. As of the date of the settlement, NRC has not evaluated the quality of Five Star Products' materials, nor has the NRC received reports that Five Star Products' materials contain defects.

2. The NRC hereby relaxes and modifies paragraph 1 and 2 of Section VI of the Order as follows:

"1. Until the Companies or H. Nash Babcock or any concern which is owned, controlled, operated or managed by H. Nash Babcock, satisfy the provisions of paragraph 2

below, they are prohibited from:

A. providing or supplying structures, systems, or components, including grout and concrete, subject to a procurement contract specifying compliance with 10 C.F.R. Part 50 Appendix B; and

B. providing or supplying basic components, including grout and concrete, subject to a procurement contract specifying that the contract is subject to the requirements of 10 C.F.R. Part 21;

2.A. If the Companies, or any concern owned, controlled, operated or managed by H. Nash Babcock, desire to lift the prohibitions specified in paragraph 1.A and 1.B, above, then the Companies, H. Nash Babcock, or the concern owned, controlled, operated, or managed by H. Nash Babcock, shall, at least 90 days prior to the date it desires to have the prohibition lifted:

(1) Advise the NRC of that intent in writing;

(2) Deleted.

(3) Agree in writing, under oath or affirmation, and in fact, to permit the NRC, NRC licensees, and contractors performing QA functions for such licensees, to inspect the records, premises, basic components and activities of the companies or of any concerned owned, controlled, operated or managed by H. Nash Babcock that desires to provide safety-related products or basic components, or to perform tests to support claims that those products or components and those testing services meet the standards of 10 C.F.R. Part 50 Appendix B and 10 C.F.R. Part 21, and to signify in writing a willingness to do so in the future;

(4) Agree in writing under oath or affirmation to demonstrate and in fact to demonstrate that those basic components and services associated with basic components meet the standards of 10 C.F.R. Part 50 Appendix B by having tests performed by a mutually acceptable third party and having that third party provide copies of the results of those tests directly to the NRC; and

(5) The officers, managers, and supervisors of the Companies provide statements that they understand that the activities and records of the organization are subject to NRC inspection and that communications with the NRC must be complete and accurate;

B. When all conditions of paragraph 2.A above have been satisfied, and the NRC has conducted inspections of the QA program and Part 21 program of the Companies or of any concern owned, controlled, operated, or managed by H. Nash Babcock, and any necessary corrective action has been completed, the prohibitions of paragraphs 1.A and 1.B, above, will be lifted in writing.

3. Except for the enforcement action reflected in the above-relaxed Order and this Stipulation, the NRC will neither impose, nor seek to impose, any sanction (other than as set forth in the relaxed Order and Stipulation) on the Companies or their officers and employees or H. Nash Babcock for the alleged violations described in the NRC Order issued on December 1, 1995.

4. All matters involving the termination of employment of Mr. Edward P. Holub are not covered by, or affected by, this Stipulation, the Stipulation is without prejudice to the parties' positions with respect to the Commission's jurisdiction or lack thereof over employment matters, and the NRC, the Companies, any other related company, and H. Nash Babcock retain all rights in any such case, matter, proceeding, or litigation now pending or which may hereinafter be instituted.

5. In light of this Stipulation, the Companies and H. Nash Babcock agree not to request a hearing on the matters addressed in the Order issued on December 1, 1995 and relaxed as described herein, despite their vigorous disagreement with some of the allegations contained in the December 1, 1995 Order.

6. The NRC, the Companies, and H. Nash Babcock agree that the allegations in the Order have not been made

subject to an evidentiary hearing, and that this Stipulation will obviate the necessity for such a hearing, and they therefore agree that those allegations shall not estop any party from taking a different position on such matters in any other case, litigation, matter, or proceeding.

7. The Order as relaxed herein shall be effective upon execution of this Stipulation. This Stipulation shall be published in the Federal Register.

8. The persons signing below certify by their signatures that they have authority to sign this Stipulation for the entities appearing below their names.

Dated: December 28, 1995.

For the United States Nuclear Regulatory Commission.

James Lieberman
Director, Office of Enforcement
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
(301) 415-2741

Michael F. McBride
LeBoeuf, Lamb, Greene & MacRae, L.L.P.
1875 Connecticut Avenue, N.W.
Suite 1200
Washington, D.C. 20009-5728
Attorney for Five Star Products, Inc.,
Construction Products Research, Inc.,
and H. Nash Babcock.

November 30, 1973

NOTE TO: D. F. Knuth

Based on the enclosed Memorandum to Files, it is my opinion that our ability to conduct direct investigations of architect-engineers, nuclear steam suppliers, and component parts manufacturers engaged in nuclear activities rests on extremely doubtful statutory authority.

Under the circumstances, if it is believed that such authority is needed, appropriate legislation should be sought.

Howard K. Shapar
Assistant General Counsel
Licensing and Regulation

Enclosure:

As stated

NOTE TO FILES

ON THE STATUTORY AUTHORITY OF THE AEC TO INSPECT DIRECTLY ARCHITECT-ENGINEERS, NUCLEAR STEAM SUPPLIERS, AND MANUFACTURERS OF COMPONENTS AND EQUIPMENT IMPORTANT TO NUCLEAR SAFETY

The question at issue is whether the AEC has the statutory authority to inspect directly (1) architect-engineering firms engaged in the design of nuclear facilities; (2) steam system suppliers; and (3) manufacturers of components and equipment important to nuclear safety, without going through a licensing procedure.

I have been able to find four possible bases in the Act for this authority. They are 161(c); (i)(3); (o); (p). The subsections giving substantive rulemaking power of those cited are (i), (o) and possibly (p). Following is an examination of each of the subsections' applicability to the question at issue.

§161(i)(3)

This subsection states that, "In the performance of its functions the Commission is authorized to prescribe such regulations or orders as it may deem necessary . . . (3) to govern any activity authorized pursuant to this Act, including standards and restrictions governing the design, location, and operation of facilities used in the conduct of such activity, in order to protect health and to minimize danger to life or property."

The first question is whether an investigation of the above named persons is an activity authorized by the AEC. §161(i)(3) does not itself provide the authority for the regulations. That authority must come from somewhere else. Once this authority is found, §161(i)(3) might be used

as a basis for the issuance of any regulations to govern that activity. The only ground for this authority I have been able to find are those sections which provide for licensing the manufacture of production or utilization facilities. (§§101, 103). The question then becomes whether these licensing sections provide the authority for regulating activities (i.e., the proposed inspection program) which: (1) are not in fact licensed; (2) which may not in fact be licensable (e.g., activities of Architect-Engineers, see Conclusion, *infra*, p. 6); but (3) which are a necessary and integral part of that activity which is licensed. I have been unable to resolve this question. In addition, at least one case suggests that the language of §161(i)(3) grants the Commission regulatory authority over the activities of licensees only, and not simply "any activity authorized pursuant to this Act", as the literal wording would suggest.

In *Reynolds v. U.S.*, 286 F. 2d 433 (9th Cir., 1960) the Court, in finding that the Atomic Energy Act of 1954 was designed to increase private participation in the nation's atomic energy program and to allow regulation of that private activity, but that the Commission was not thereby authorized to issue a regulation barring trespass upon grounds being used by the Commission, held that both the trespass regulation, purportedly issued thereunder, and conviction, for violation of such regulation by entering a nuclear test area, were invalid. In particular, the Court construed §161(i) which appellee argued provided the authority for the Commission's regulation (which barred "U.S. citizens from entering a 390,000 square mile 'Danger Area' surrounding the [Eniwetok] proving grounds [in the Pacific Ocean], except with the express approval of appropriate officials" (286 F. 2d at 433), and held that it [§161(i)] "deals with licensees who are authorized to handle and utilize facilities and materials potentially capable of causing disasters to public safety and security; it gives the Atomic Energy Commission the power to regulate such licensees in

the national interest and, in conjunction with §223, it makes willful violations of such regulations a felony." (*Id.* at 441). The Commission's position was, in the words of the Court, that "§161(i) authorizes any and all regulations designed to protect Restricted Data, to guard against loss or misuse of special nuclear material, or to protect health and safety, in connection with *any* activity in the Atomic Energy Act, whether an activity of licensees or of the Commission itself" (*Id.* at 435 - ital. in orig.).

The Court reached this conclusion essentially by examining the legislative history. It was especially influenced by the fact that:

> (1) §161(i) was not a part of the original Atomic Energy Act;
>
> (2) One of the major purposes behind the 1954 Act was a desire "to provide for increased private participation in the atomic energy program under safeguards to be promulgated administered by the Commission" (*Id.* at 436);
>
> (3) The proposed drafts of amendments to the 1954 Act revealed that, "the whole plan is concerned with the activities of private licensees, and not the activity of the Commission itself" (*Id.* at 437); and
>
> (4) "Examination of the 1954 Act eventually enacted indicates that the same basic plan was followed there" (*Id.* at 437-38).

Thus, the court said, "the whole legislative history of the Atomic Energy Act of 1954 supports the conclusion that the '[activities] authorized pursuant to this Act', which §161(i) refers to (sic) are those activities *of private industry* authorized by the Atomic Energy Commission pursuant to

the powers granted to it in §§31, 41, 53, 81, 103 and 104." (*Id.* at 438).

Even though, at first blush, *Reynolds* seems to directly preclude the use of §161(i) as a basis for regulatory authority over non-licensees, a closer examination leaves some doubt as to its applicability to our case.

To begin with, the Court glossed over the fact that there was a change in wording from the J.C.A.E. draft proposal of what eventually became §161(i) of the 1954 Act to the version finally adopted. The draft said,

> "(3) to establish such standards and instructions governing activities *licensed* pursuant to this section, including standards and instructions governing the design, location and operation of facilities used by the *licensee* in the conduct of such activities, as the Commission may deem necessary to protect health and to minimize danger from explosion or other hazard to life or property" (ital. mine).

It is clear that the draft version gives the Commission authority to prescribe rules and regulations over licensees only. What is meant by the wording of §161(i)(3) as passed, ". . . any activity authorized pursuant to the Act . . .", is not clear. Nor is the legislative history any help. The only guide we have is the fact that Congress, if it meant §161(i)(3) to apply to licensees only, (1) could have said so, by either leaving the draft version alone or otherwise, and (2) since it didn't, it must have intended some change in meaning. Whether that meaning corresponds to the meaning we would give it is unknown.

Finally, it is possible that the Court in *Reynolds* was simply unaware of the distinction between activities of licensees and any activity authorized pursuant to the Act. First, it leaves the question in *Reynolds* unaffected; second as a result, language in *Reynolds* suggesting that §161(i)

applies only to licensees is dicta and not controlling; and third, the *Reynolds'* Court itself spoke at times of §161(i) applying to "licensees" only (e.g., 286 F. 2d at 437), and at other times applying to "activities of *private industry* authorized by the AEC". (*Id.* at 438) (ital. in orig.).

Perhaps most importantly, *Reynolds* was factually concerned with §161(i)'s authorizing activities conducted on the General Manager's side of the house. Whether the Court would have been as restrictive in its construction of §161(i) if the question concerned the scope of the Commission's regulatory powers, is, of course, unknown.

However, even if §161(i) provides for regulatory authority over activities "pursuant to the Act" of even non-licensees, the question remains whether the licensing sections do authorize this activity.

§161(o)

This subsection states, in relevant part, that, "In the performance of its functions the Commission is authorized to require by rule, regulation, or order, such reports, and the keeping of such records with respect to, and to provide for such inspections of activities and studies of types specified in section 31 and of activities under licenses issued pursuant to sections . . . 103 . . . , as may be necessary to effectuate the purpose of the Act . . ."

The first question this provision raises is similar to that raised by §161(i)(3). Here, however, we have an express reference to licenses. The issue becomes whether the activities of the architect-engineers and/or the nuclear steam suppliers and/or the component parts manufacturers are "activities under licenses . . . ." Again, the reasoning depends on accepting the argument that §103 grants the Commission authority over not only the licensees *per se*, but also over those who are a necessary and integral part of the activity which is in fact licensed (see p. 2). As with

§161(i)(3), I have been unable to definitely resolve this question although it should be pointed out that (1) the spirit, if not the content of *Reynolds* (*Reynolds* did not involve the construction of §161(o)) would restrict the application of the section to licensees and (2) a memorandum by the General Counsel, concerned with whether the Commission has the authority to obtain cost information from a reactor manufacturer, concluded that §161(o) gives the Commission authority over licensees only. (*See* Note File, §161-#9). (As to whether nuclear steam suppliers and/or component parts manufacturers may be licensed themselves, see the Conclusion, *infra* p. 6).

§161(c)

This subsection states, in relevant part, that, "In the performance of its functions the Commission is authorized to make such studies and investigations, obtain such information, and hold such meetings or hearings as the Commission may deem necessary or proper to assist it in exercising any authority provided in this Act, or in the administration or enforcement of this Act, or any regulations or orders issued thereunder. For such purposes the Commission is authorized to administer oaths and affirmations, and by subpoena to require any person to appear and testify, or to appear and produce documents, or both, at any designated place . . . ."

Does §161(c) give the Commission authority over persons other than licensees? In OGC Memorandum "The Commission's Authority to Obtain Cost Information From a Reactor Manufacturer", the author concluded §161(c) would support the proposition that the Commission can require information, from persons not licensees, at least of the type above described.

The legislative history of the section does not reveal what Congress intended by this paragraph. From the

unambiguous language of the section itself, however, the author concluded that, "Since information sought by the Commission under subsection 161(c) must have relevance to the exercise of some authority in the Act, or the administration or enforcement of the Act, or regulations or orders issued under the Act, it is necessary to determine the substantive purpose for which the Commission would seek information for G.E. There would appear to be at least one principal Commission function for which such information would have substantial relevance: the determination of the desirability of making a finding under section 102 of the Act that (certain) boiling water nuclear power reactors have been sufficiently developed to be of practical value for industrial or commercial purposes." In n. 6, the memo goes on to say that, "Another purpose which might conceivably justify an inquiry under subsection 161(c) is the implementation of the policy declaration set forth in section 1(b) of the Act that the development, use and control of atomic energy shall be directed so as to strengthen free competition in private enterprise. In furtherance of this policy, as effectuated by the antitrust provisions of section 105, cost information might be used in relation to possible antitrust violations such a [*sic*] price discrimination (15 USC § 1) and the attempt to utilize a dominant position in one market, e.g., turbines, in an attempt to monopolize another market, i.e., nuclear reactors (15 U.S.C. §2)."

As applied to our situation we would probably meet the internal tests of §161(c) without much trouble. First, it does have relevance to the exercise of some authority—i.e., the licensing sections. Second, it would aid in the administration or enforcement of the Act (RO's reason for wanting these investigations is principally that the Regulatory staff is hindered in fulfilling its statutory duty as expressed in §§3(d), 103(b) and other sections). Third, it would have relevance to regulations issued under the Act (*see, e.g.*, Part 50, Appendix B; §50.57(a)(3), *etc.*).

The question remaining is whether 161(c) would support *a continuing* investigation program. As to this, I have substantial doubt. The second sentence of §161(i) states:

> For such purposes (i.e., here, authority to conduct investigations "as the Commission may deem necessary . . ."(161(c) first sentence) the Commission is authorized to administer oaths and affirmations, and by subpoena to require any person to appear and testify, is [*sic*] to appear and produce documents, or both, at any designated place . . .

This strongly implies that Congress intended the investigative authority to cover formal investigations and not provide a basis for a routine inspection program of the type envisaged by R.O. In addition, if Congress intended §161(c) to support an inspection program, it could, as in §161(o), have simply said so. However, there is nothing expressly preventing us from giving such a construction to §161(c).

§161(p)

This subsection states, "In the performance of its functions the Commission is authorized to make, promulgate, issue, rescind, and amend such rules and regulations as may be necessary to carry out the purposes of this Act."

Although this seemingly would provide the statutory authority for RO's direct inspection program (*see* Sec. 3(d)—Purposes), there is a serious question as to whether §161(p) is a grant of substantive rulemaking authority.

In OGC internal memo, "Authority of AEC to prohibit, by regulation, assertion of defenses to third party liability claims for damages arising from nuclear incidents in connection with the operation of foreign nuclear ships under Atomic Energy Act, as amended by proposed foreign

nuclear ship legislation", dated Jan. 21, 1970, by J. Becker, the question whether §161(p) is a grant of substantive rulemaking authority was considered. On pp. 2-3, it states, "An agency clearly has authority to issue a regulation which has the 'force and effect of law,' i.e., a legislative rule, if a statute specifically confers the authority to issue it on a defined subject, and prescribes penalties or other effects which its violation shall have." (Memo, J. Becker, pp. 2-3, citing Davis, *Administrative Law Treatise*, §5.03). The memo continues that it is doubtful whether (p) meets this test. "First of all, it does not relate to a defined subject. Secondly, there are no penalties specifically provided by the Act for its violation." Memo, J. Becker, p. 3a. However, the author notes in parenthesis that "section 232 authorizes the Attorney General to seek an injunction against acts constituting a violation of any regulations issued under the Act . . ." *Id.*

Nonetheless, the general rule is that "regulations designed to effectuate the purposes of the statutes under which they are promulgated have the force and effect of law, so long as they are reasonably consistent with the statutes" (Collins, J. Dissenting in *Henneberger v. U.S.*, 403 F.2d 237, 244 (1968). J. Collins goes on to say that, "The standard used to measure the consistency between the statute and the regulations thereunder is one of reasonableness . . . And in determining whether a regulation reasonably effectuates the purposes of the controlling statute, the legislative history of the statute is pertinent and may be controlling." *Id.* (Note—J. Collins cites many cases for his propositions—which I have not checked. The basis of his dissent was in no wise related to the general rule quoted above).

The legislative history of §161(p) tends to show that the rulemaking authority was intended to apply to internal personnel and contract matters which would not have the effect of law with respect to the substantive rights of third

persons. Relevant excerpts of the legislative history may be found in Memo, J. Becker at pp. 3-9.

Conclusion

It would therefore appear that our ability to inspect directly architect-engineers, nuclear steam suppliers, and manufacturers of components and equipment important to nuclear safety rests on doubtful statutory authority. However, if authority could be found to license these people, then regulations creating an inspection system over them would, of course, have a statutory basis.

As indicated above, the licensing sections almost certainly do not encompass the activities of architect-engineers—i.e., the design process. However, the activities of both nuclear steam suppliers and component part manufacturers almost certainly can be licensed, under section 103, 104 or 109, as appropriate. Note that to license under these sections the Commission would have to find, under section 11(v)(2) or (cc)(2) that component parts and nuclear steam suppliers* are involved in the manufacture of "important component part[s] especially designed for such equipment or device . . ." (i.e., referring to production or utilization facilities) (§§11(v)(2), 11(cc)(2)).

Theodore S. Bloch

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* If what is meant is the entire facility, rather than the supply of a part of the facility, then, of course, no such finding is required.

For: The Commissioners

From: Howard K. Shapar
Executive Legal Director

Thru: Executive Director for Operations

Subject: SECY-78-308—PROTECTION OF INFORMANTS—RESPONSE TO COMMISSION QUESTIONS REGARDING SECTION 7 OF S. 2584

Purpose: A Commission position on the above legislation.

Discussion: INTRODUCTION

During the Commission meeting on the above subject on September 5 1978, OELD was requested to prepare an analysis of Section 7 (Employee Protection) of S. 2584, the Nuclear Regulatory Commission authorization bill. The Commission requested this review in order to formulate a position on this section of the proposed legislation.

Attachment A is a copy of the proposed amendment (a new Sec. 210 of the Energy Reorganization Act of 1974, as amended), which provides authority to the Department of Labor to protect employees of NRC licensees and others from discrimination for having provided information to the NRC.

Attachment B is a copy of the section analysis contained in Senate Report No. 95-848, which accompanies S. 2584.

Attachment C is a copy of the Commission's letter to Congressmen John Dingell and Richard Ottinger, dated August 9, 1978, responding to several questions, one of

which concerned the need for additional legislative authority to protect workers at nuclear power reactors who raise questions about compliance with NRC requirements. Also attached are the pertinent enclosure pages to the letter which discuss that subject. In essence, the Commission indicated that the NRC did not presently possess full authority to protect employees who provide information, such as authority to require reinstatement of a discharged employee or payment of back wages, and that the Commission was considering whether it needed additional authority in this area.

ANALYSIS

Present Law

As explained in more detail in SECY-78-308, NRC presently has authority to adopt and enforce (by license suspension, license revocation and civil penalties) regulations prohibiting licensees from discharging or otherwise discriminating against their employees for providing radiological safety or common defense and security related information to NRC. 10 C.F.R. § 19.16(c) of the Commission's regulations does implement some of this authority as applied to licensees, other than construction permittees, who discharge or otherwise discriminate against employees who file complaints with NRC, initiate proceedings before NRC, or testify or propose to testify in NRC proceedings on occupational radiological safety matters. However, the Commission presently lacks any clear authority to take action to directly protect the employee (for example, by ordering reinstatement, back pay, or other compensation). Also, NRC's authority to take effective enforcement action probably does not extend to non-licensees.

THE LEGISLATION

Section 7 of S. 2584 adds to Title II of the Energy Reorganization Act a new Section 210 entitled "employee Protection." This provision establishes a framework for the direct protection of employees of NRC licensees, applicants, subcontractors of Commission licensees or applicants, and others who assist or participate in any proceeding under the Energy Reorganization Act of 1974 or the Atomic Energy Act of 1954 or assist or participate in any other action to carry out the purposes of these Acts. The provision would protect these employees from reprisals by their employers in connection with such assistance or participation. An employee against whom reprisals have been taken by his employer may seek redress through an administrative proceeding in the Department of Labor. The Department could order reinstatement of the employee, back pay, and compensatory damages, and assess costs of the proceeding against the employer. Review of the outcome of the administrative proceeding may be had in the United States court of appeals for the circuit in which the violation is alleged to have occurred. The Secretary of Labor and the employee himself may enforce any order resulting from the administrative proceeding in an action in the appropriate United States District Court. The court is granted authority to award litigation costs including reasonable attorney and expert witness fees in such enforcement proceedings.

Section 7 thus provides explicit authority for the protection of workers who disclose information to the Commission by providing a mechanism for the Department of Labor to investigate charges of discrimination against such employees, and a remedy if such discrimination has in fact occurred. The bill does not, by its terms, grant any new authority to NRC. The new authority is in the Department of Labor.

As the Committee report on the bill indicates, the provision is substantially identical to counterpart provisions in the Clean Air Act and Federal Water Pollution Control Act, enacted in 1972 and 1977, respectively. We discussed these provisions with the Department of Labor and EPA, and were informed that it is too early in the implementation of the respective employee protection provisions to assess the impact or contribution of such legislative provisions.

BASIC COMMISSION SUPPORT FOR THE BILL

The initial question is, of course, whether NRC should support legislation that would provide additional protection to employees who provide information to NRC. This was the main issue discussed in SECY-78-308 and the pros and cons for additional legislative authority are discussed therein. As indicated in that paper, I&E and NRR both supported additional legislative authority in this area, while SD questioned whether the need for a program for protection had been demonstrated. ELD believes that it will be extremely difficult for NRC not to support such legislation in the radiological safety and common defense and security area when present law already provides for employee protection in the clean air, clean water, and occupational safety areas.

The next question relates to the basic form such legislation might take. This is also discussed in SECY-78-308. There are three basic options. One could provide a statutory remedy to the employee that cannot be administratively enforced but which requires the employee (or someone acting on his behalf) to bring an action in court. SECY-78-308 suggests that this type of provision gives rise to delays in obtaining effective remedies. As a second option, one could provide authority for NRC to investigate and take administrative action for discriminatory actions.

The third option would be to vest this authority in another agency. I&E, SD, NRR and ELD all agree that any legislation dealing with employer-employee relations (as would be the case if the remedies to be made available to the employee included reinstatement and back pay) should be implemented by an agency (such as the Department of Labor) with more expertise than NRC has on labor management relations.

POSSIBLE CHANGES TO THE BILL

As indicated, Section 7 of S. 2584 does not grant any additional authority to NRC, although NRC's present authority to take enforcement against licensees for discriminatory acts would not be affected. The bill does provide authority to the Department of Labor to investigate and order remedial action with regard to discriminatory acts along the lines of that suggested in the foregoing discussion. The question remains whether the provisions of the bill should be broadened as to non-licensee employers who discriminate against their employees for providing information to NRC so as to not only subject them to Department of Labor proceedings leading to remedial actions that would compensate the employee but subject them to NRC or Labor civil penalty proceedings as well. Section 7 does not provide for imposition of any civil penalties by either Labor or NRC.

As a general matter, up to now, non-licensee employers have never been legally subject to substantive AEC/NRC regulatory requirements. Only when 10 C.F.R. Part 21 became effective (implementing section 206 of the Reorganization Act requiring reports to NRC of safety defects and violations) did non-licensee contractors become directly subject to civil penalties for nuclear safety related violations. Making discriminatory actions by non-licensee employers subject to civil penalties would not appear to

provide any direct additional penalty on the employer. Whether a civil penalty, when added to the "penalties" of employee reinstatement, awards of back pay and damages to the employee, and assessment of the costs of the proceedings before the Department of Labor would provide any further dissuasion to employers considering discriminatory acts, is problematical. An NRC civil penalty provision would have the disadvantage of making the employer subject to two proceedings before two separate agencies on the same factual circumstances. On the other hand, the same would be true with regard to licensee violations if NRC's present authority is preserved. This problem as applied to non-licensees would be avoided if Labor, rather then NRC, were to be given the civil penalty authority.

POSSIBLE ITEMS OF CLARIFICATION

1. While providing the Department of Labor with new authority to investigate and provide a remedy to the employee who had been discriminated against, the bill does not by its terms interfere with the Commission's current authority to investigate the alleged discrimination and take appropriate enforcement action directly against a licensee-employer for such discrimination (such as civil penalties, license suspension, and license revocation). However, it would be useful if the legislative history would emphasize this point. It would also be useful to indicate that the pendency of a proceeding under Section 7 before the Department of Labor need not delay any necessary action by NRC to carry out the purposes of the Atomic Energy Act.

2. The bill is intended to prohibit employers from discharging or discriminating against employees who participate or assist in formal proceedings or participate or assist in "any other action" to carry out the purposes of the Atomic Energy Act or Energy Reorganization Act. The

language could be read to limit employee remedies to those circumstances which lead up to formal NRC proceedings. Therefore, the meaning of the phrase "and any other action" appearing in section 210(a)(3) could be clarified in the legislative history so as to indicate clearly that an employee would still be protected even if no proceeding before the NRC was actually instituted.

3. The Committee report indicates that the new section will help assure that employers do not violate Atomic Energy Act requirements. Since as a general matter only licensees are subject to Atomic Energy Act requirements, the Committee report could be read incorrectly as implying that only employer-licensees were intended to be covered. This could be clarified in the legislative history.

4. Subcontractors are specifically subject to the section but contractors are not. While the section by its terms applies to all "employers", a term which would include contractors as well as subcontractors, the legislative history could clarify that the term "employer" is to be given a broad meaning.

5. It would be useful if, upon receipt of a complaint, the Department of Labor was required to notify the NRC as well as the employer. This could be done by adding "and the Nuclear Regulatory Commission" after the word "complaint" on line 17 of S. 2584, as reported.

Recommendation and Coordination:

ELD believes that NRC should support Section 7 of S. 2584, with the items of clarification noted above. Surely employees who provide information to NRC regarding radiological safety or common defense and security matters are as deserving of protection as employees who provide information to EPA about air and water pollution. Yet, under present law, only the latter employees are fully protected. S. 2584 is due to be taken up by the Senate very

shortly, so any NRC letters of support, along with a discussion of the clarification items noted above, should be sent to House and Senate conferees. A sample letter is included as Attachment D. ELD opposes any suggested amendment of S. 2584 to make non-licensees subject to civil penalties. In ELD's view, an employer intent on some discriminatory action who is not dissuaded by the prospect of a Department of Labor proceeding leading to awarding of back pay, compensatory damages and litigation expenses and employee reinstatement would not likely be dissuaded by the additional prospect of a civil penalty.

NRR and I&E concur. SD believes that no showing has been made that such an employee protection program is needed, but that if the Commission does decide to support legislation in this field, Section 7 of S. 2584, with the items clarified as suggested, is adequate.

Howard K. Shapar
Executive Legal Director

Attachments:
"A" - Proposed amendment
"B" - Section Analysis
"C" - Commission's letter to Dingell and Ottinger
"D" - Sample Letter

UNITED STATES
NUCLEAR REGULATORY COMMISSION
Washington, D.C. 20555
October 14, 1982

MEMORANDUM FOR: Robert M. Bernero, Director
Division of Risk Analysis
Office of Nuclear Regulatory Research

FROM: William J. Olmstead
Director and Chief Counsel,
Regulations Division
Office of the Executive Legal Director

SUBJECT PROPOSED RULE—AMENDMENTS TO 10 C.F.R. PART 21

We have reviewed your proposed amendments to 10 C.F.R. Part 21 dated September 28, 1982. We have four principal legal concerns and a number of editorial suggestions as indicated in the margins of the enclosed markup.

The authority for Part 21 requirements involving management procedures to insure the reporting of defects and noncompliance must be derived from Section 206 of the Energy Reorganization Act of 1974. That section only applies to "any individual director, or responsible officer of a firm . . . ." It does not reach all "persons" as that term is defined in the Atomic Energy Act nor does it permit the direct imposition of civil penalties on non-licensees who are corporate entities absent specific facts showing that an individual director or responsible officer of the corporation who is responsible under Section 206 had obtained reportable information. While the Executive Legal Director has

advised in a few isolated cases that a legal theory to support the imposition of civil penalties on non-licensees existed, those cases involved significant case specific facts which are not available to support a generic requirement. A legal theory to support a generic rule reaching all non-licensees does not appear legally viable in view of the plain words of Section 206 and the considerable legislative history of the section indicating that Congress did not intend such an approach. The legal risks are so substantial that this office cannot recommend attempting to fashion such a regulation.

The Commission's approval of civil penalty action against non-licensee Babcock & Wilcox subsequent to the TMI-2 accident does not resolve the legal questions concerning Commission authority. At best the Commission's action signalled a willingness to face some litigative risk in a single case. Extending the position taken in that case to cover several supplier industries presents a major change in policy and a litigative risk of substantially greater magnitude. Publishing a proposed rule which makes such a change and is accompanied by such risk is a significant policy question not within the scope of authority delegated to the EDO. In addition, deleting the "condition or circumstance" paragraph from § 21.3(d) appears to be a significant change as is the requirement of procedures which insure notification of purchasers and licensees of a deviation before its safety significance is evaluated. Consequently, it is our position that the issue is a major policy question and that the legal question should be fully identified for the Commission should you decide to proceed.

Aside from the legal question presented above, the proposal requires additional work. A number of ambiguities are present. Some are so significant that the rule could be held unenforceably vague (e.g. identification, screening and notification section; record keeping section).

Support for the environmental impact, regulatory

flexibility and regulatory impact conclusions is weak or nonexistent. The preamble states that the proposed amendments would not result in activity that significantly affects the environment. There is no statement to support this conclusion (although after reading the amendments its validity is fairly apparent). The regulatory flexibility statement presents a good summary of expected impacts but the value impact portion of the regulatory analysis does not address impact on small entities. It should provide support for the conclusions of the regulatory flexibility statement. If the net impact on small entities is uncertain, comments from small entities should be solicited in the preamble. *See*, NRC Regulations Handbook 49 (August 1982). Finally, as noted in the regulatory analysis, the information contained therein should correspond to the guidance provided in SECY-82-187, Revised Guidelines for Preparing Value Impact Analyses.

In light of the questions raised in this memo we are willing to meet if you desire to discuss these matters in greater detail.

William J. Olmstead
Director and Chief Counsel
Regulations Division
Office of the Executive
Legal Director

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December 1, 1982

MEMORANDUM TO:
Jane Axelrad
Acting Director of Enforcement, IE

FROM: James Lieberman
Director and Chief Counsel
Regional Operations and Enforcement Division OELD

SUBJECT: ENFORCEMENT ACTION AGAINST VENDORS

By memorandum, the Administrator of Region IV raised a question concerning the ability of the Commission to take enforcement action directly against a vendor and more specifically, a vendor who knowingly shipped defective parts to a licensee for use in a nuclear facility. Under the current regulatory scheme, NRC does not have direct regulatory authority over vendors. Therefore, NRC cannot take enforcement action directly against vendors.

From a legal view, the Commission's enforcement authority extends to its licensees. A licensee is responsible for and may be subject to sanctions for the acts of its vendors who cause the licensee to be in non-compliance with a Commission requirement. The exception to this is the issuance of a Notice of Violation for a vendor who fails to comply with the requirements of 10 C.F.R. Part 21. It should be noted that enforcement action could be taken directly against certain vendors, provided the Commission exercised its authority under the Atomic Energy Act to license vendors who manufacture certain basic components. However, the Commission has not yet exercised this authority.

While enforcement action cannot be taken directly

against vendors under limited conditions enforcement action can be taken against certain employees of vendors. Civil actions may be taken against responsible officials for knowingly and consciously violating the reporting requirements under Section 206 of the Energy Reorganization Act of 1974. Criminal action may be taken against directors, officers, and employees for certain knowing and willful violations under Section 223(b) of the Atomic Energy Act of 1954, as amended. Further information is necessary to determine whether the circumstances surrounding the matter of concern to the Region fits the elements of these statutes.

I would be pleased to discuss this matter with you and the Region at your convenience.

James Lieberman
Director and Chief Counsel
Regional Operations and
Enforcement Division OELD

cc: W. Olmstead
J. Collins, RIV

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UNITED STATES
NUCLEAR REGULATORY COMMISSION
Washington, D.C. 20555

March 3, 1983

MEMORANDUM FOR: Guy H. Cunningham, III
Executive Legal Director

FROM: James Lieberman
Director and Chief Counsel
Regional Operations and Enforcement Division

SUBJECT: VENDOR INSPECTION: LEGAL AUTHORITY, ENFORCEMENT STRATEGIES

I. *INTRODUCTION*

The Commission has implemented, in addition to its regulatory program directing our licensees, a vendor inspection program. The purpose of the vendor inspection program is to monitor the suppliers of products and services utilized by licensees.[1] The Commission's regulations specifically provide for inspections of licensees.[2]

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[1] *See, e.g.*, IE Manual ch. 2700, Licensee Contractor and Vendor Inspection Program (Oct. 1, 1982); ch. 2730 Component Manufacturer Inspection Program (Feb. 18, 1976); ch. 2732, Pipe Fabricator Inspection Program (Feb. 18, 1976); ch. 2734, Pump Manufacturer Inspection Program (Feb. 18, 1976); ch. 2735, Fuel Manufacturer Quality Assurance Inspection Program (Jan. 1, 1976); ch. 2736, Electrical Equipment Inspection Program (July 1, 1977).

[2] 10 C.F.R. § 50.70(a) (1982) requires that "[e]ach *licensee* and each holder of a construction permit *shall* permit inspection, by duly authorized representatives of the Commission, of his records, promises,

However, the regulations do not specifically reference vendor[3] inspections. This memorandum addresses two issues associated with the vendor inspection program. First, the legal bases for the vendor inspection program, and second, enforcement strategies available against vendors who do not meet quality assurance requirements.

II. *LEGAL BASES FOR THE VENDOR INSPECTION PROGRAM*

A. *The Atomic Energy Act*

Section 161 of the Atomic Energy Act, of 1954, as amended (Act) 42 U.S.C. § 2201 (1976), contains the general grant of authority given to NRC for implementing the purposes of the Act.[4] Three separate subsections are potential sources of authority for vendor inspections: Section 161(c), the Commission's investigative authority; section 161 (i)(3), which empowers the Commission to prescribe regulations or orders applicable to certain activities under the Act, and section 161(o), the general inspection provision.[5]

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activities and licensed materials in possession or use, related to the license or construction permit as may be necessary to effectuate the purposes of the act . . . ." (emphasis added).

[3] "Vendor" as used in this memorandum is a generic term which encompasses all individuals and business entities who supply component parts, designs, testing or consulting services to licensees.

[4] Section 201(f) of the Energy Reorganization Act of 1974, as amended, 42 U.S.C. § 5841(f) (1976) transferred all "licensing and related regulatory functions" of the Atomic Energy Commission under the Atomic Energy Act to NRC.

[5] Section 161(p), which grants the Commission general authority to promulgate rules and regulations, has been interpreted as a housekeeping mechanism. *See* Note to D.F. Knuth from Howard K. Shapar, Assistant General Counsel, Licensing and Regulation (Nov. 30, 1973) at 6. Accordingly, subsection (p) is not considered a basis to inspect vendors.

Subsections (c) and (o) can be considered together. Section 161(c) empowers the Commission "[i]n the performance of its functions . . . to make such studies and investigations, [and] obtain such information" as necessary to enforce or administer not only the Act, but any "regulations or orders issued thereunder." This investigative function is augmented by subsection (o), which provides the authority for inspection of records and reports in accordance with agency regulations. Although the legislative history of the Act is silent as to the purpose of section 161(c), it is clear that subsection (o) was intended to authorize inspection of licensees:

> In order to insure compliance with all of the provisions in the Act, and for protecting the public and the national interest, the Commission is authorized to require licensees to keep records and make reports to the Commission. *AEC is authorized to make inspection of a licensee's activities.* As a matter of fact, a very important statutory program . . . is the establishment of an Inspection Division . . . as an aid in seeing that all obligations of a licensee . . . are fulfilled.

100 Cong. Rec. S10083 (July 15, 1954) (remarks of Sen. Pastore) (emphasis added).

The Commission has used this authority to promulgate regulations which expressly provide for the inspection of licensees.[6] Neither interpretative case law[7] nor State-

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[6] *See* 10 C.F.R. § 50.70(a)(1982), *supra* note 2; 10 C.F.R. 30.52(a) (byproduct material); *Id.* at § 40.62(a) (source material); *Id.* at § 70.55(e) (special nuclear material); *Id.* at § 71.63(a) (transportation of radioactive materials).

ments of Consideration pertaining to inspection regulations[8] broaden inspection authority to include vendors.

Section 161(i)(3) of the Act, 42 U.S.C. § 2201(i)(3) (1976) is a broadly drafted provision which provides authority for the Commission in the performance of its functions to promulgate regulations or orders as it deems necessary: "to govern any activity authorized pursuant to this Act, including standards and restrictions governing the design, location, and operation of facilities used in the conduct of such activity, in order to protect health and minimize danger to life or property." A literal reading of the provision suggests that it merely enables the Commission to engage in rulemaking or issuance of orders for activities enumerated elsewhere in the Act, but provides no independent substantive authority.[9]

Documents from the Joint Committee on Atomic Energy do not elucidate Congressional intent on this point. However, in testimony before the Joint Committee, Commissioner Campbell of the then-existing Atomic Energy Commission seemed to consider subsection (i)(3) as an implementation provision:

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[7] In one case, 10 C.F.R. 50.70 was referred to in broad terms as granting authority to investigate and inspect as deemed necessary to protect public health and safety. *See Union Electric Co. (Callaway Units 1 and 2)*, LBP-78-31, 8 NRC 366, 374 (1978) *aff'd* ALAB-527, 9 NRC 126 (1979).

[8] *See* 30 Fed. Reg. 8185 (June 26, 1965) (§ 30.52); 45 Fed. Reg. 65521 (Oct. 3, 1980) (§ 40.62); 21 Fed. Reg. 355 (Jan. 19, 1956), 44 Fed. Reg. 47918 (Aug. 16, 1979) (§ 50.70); 25 Fed. Reg. 12730 (Dec. 13, 1960) (construing 70.55(a)); 31 Fed. Reg. 9941 (July 22, 1966) (construing 71.63(a)).

[9] One agency staff memo endorses such a reading of section 161(i)(3): "§ 161(i)(3) does not itself provide the authority for the regulations. That authority must come from somewhere else. Once this authority is found, § 161(i)(3) might be used as a basis for the issuance of any regulations to govern that activity." *See* Note, *supra* note 5, at 1.

> Section 161(i) expressly gives the Commission authority to prescribe enforceable [sic] regulations and orders to protect the security of information and of materials, and to provide additional health and safety protection in connection with any activities authorized pursuant to the Act. This provision is essential to carry out the purposes of the Act.

Hearings Before Joint Committee on Atomic Energy, 83rd Cong. 2d Sess. 562, 601 (June 2, 1954) (remarks of Comm. Campbell).

One federal circuit has interpreted section 161(i)(3) as Commissioner Campbell suggested. In *Reynolds v. United States*, 286 F.2d 433 (9th Cir. 1960), the appellate panel ruled that the AEC lacked authority under section 161(i) to issue regulations barring trespass upon property being used by the Commission. Reynolds, a private citizen (an anthropologist) entered restricted waters under AEC control in violation of an agency regulation. After reviewing the legislative history, the Ninth Circuit concluded that only activities specified by the Atomic Energy Act could be regulated by the AEC:

> The very language of § 161(i) indicates it is only dealing with licensees for it speaks of persons *receiving* Restricted Data or *producing* special *nuclear* material pursuant to the Act.
>
> Thus the whole legislative history of the Atomic Energy Act of 1954 supports the conclusion that the "[activities] authorized pursuant to this Act" which § 161(i) refers to are those activities of *private industry* authorized by the Atomic Energy Commission pursuant to the powers granted to it in sections 31, 41, 53, 81, 103 and 104.

286 F.2d at 438 (emphasis supplied by the court).[10]

The Act does not specifically address vendors and the Commission's ability to inspect vendors. Similarly, both its legislative history and case law do not address vendors. Therefore, the duty to inspect vendors must be based on the Energy Reorganization Act of 1974, as amended, or be derived from the Commission's power over licensees.

B. *Energy Reorganization Act*

One possible source of substantive authority to inspect vendors derives from section 206 of the Energy Reorganization Act, 42 U.S.C. § 5846 (1976 & Supp. IV 1980). That provision provides in pertinent part:

> (a) [a]ny individual director, or responsible officer of a firm . . . supplying the components of any facility or activity which is licensed or otherwise regulated pursuant to the Atomic Energy Act or [Energy Reorganization Act] who obtains information reasonably indicating that such . . . basic components supplied . . .
>
> (1) [fail] to comply with the Atomic Energy Act . . . or any rule, regulation, order, or license of the Commission relating to substantial safety hazards, or

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[10] The *Reynolds* analysis contains several weaknesses. The court apparently confused licensees with private industry, as evidenced by references in its opinion which make the two phrases synonymous. The *Reynolds* statements on licensees have also been regarded as *dictum*. *See* Note *supra* note 5, at 3.

> (2) contains a defect which could create a substantial safety hazard as defined by regulations which the Commission shall promulgate,
>
> shall immediately notify the commission of such failure to comply, or of such defect . . . .
>
> (d) The commission is authorized to conduct such reasonable inspections and other enforcement activities as needed to insure compliance with the provisions of this section.

Section 206 was enacted to encourage prompt identification of deficiencies at all levels of facility construction, including components supplied by vendors:

> Included is an authorization to the Commission to conduct reasonable inspection and other enforcement activities to insure compliance. Generally, this section is directed toward assuring that the Commission has prompt information concerning defects in major components of facilities subject to licensing which could create a substantial safety hazard. The Commission is required to adopt regulations promptly, with a view to defining the types of defect required to be reported relating to manufacture, assembly, installation and operation. *This provision will enable Commission agents and employees to enter business premises and make such inspections as are necessary under regulations promulgated by the Commission.* H.R. Rep. No. 1445, 93rd Cong., 2d Sess. 37 (1974) (emphasis added).

NRC regulations, codified at 10 C.F.R. § 21, provide

for vendor inspection. The regulations are applicable to "each individual, corporation, partnership or other entity doing business within the United States, and each director and responsible officer of such organization, that . . . supplies . . . basic components . . . for a facility or activity licensed . . . under Parts 30, 40, 50, 60, 70, 71 or 72 of this chapter." 10 C.F.R. § 21.2 (1982). Basic component is defined to include component parts, structures, "design, testing, inspection, inspection or consulting services." 10 C.F.R. §21.3 (1982). Vendors engage in these enumerated activities; accordingly, they are subject to the Part 21 inspection provision.[11]

Although section 206 and Part 21 provide direct inspection authority over vendors, this authority is limited to inspections for compliance with section 206 and its implementing regulations. The provision was enacted primarily as a defect reporting mechanism.[12] Part 21 implements section 206 by establishing a method for identification and notification of defects in facilities, activities and basic components. *See* 10 C.F.R. § 21.21(a) (1982). Inspections are authorized for entities "as necessary to effectuate the purposes of this part." *Id.* at § 21.41. Accordingly, Part 21 inspections identify weaknesses in vendor or licensee reporting programs,[13] but do not in-

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[11] "Each individual, corporation, partnership or other entity subject to the regulations in this part shall permit duly authorized representative of the Commission, to inspect its records, premises, activities, and basic components as necessary to effectuate the purposes of this part." 10 C.F.R. § 21.41 (1982).

[12] *See* S. Rep. No. 980, 93rd Cong., 2d Sess. (1974); H.R. Rep. No. 1445, 93rd Cong., 2d Sess. (1974).

[13] Office of Inspection and Enforcement comments on Part 21 reflect this view:

> We look upon this rule as another requirement which must be covered by our current inspection programs. Those programs cover both reactor and material licensees, and the inspection of

clude the broader inspection authority sought over vendors: inspection for compliance with NRC requirements.

C. *Derivative Authority Over Vendors*

NRC is empowered by the Act to conduct investigations and inspections of its licensees. However, as indicated above, vendor inspection is not expressly authorized by the Act, nor is it addressed in the legislative history.[14] Numerous intra-agency sources have espoused the position that the ability to inspect vendors is derivative—the Commission's power over the licensee carries through to vendors.[15] Derivative power is created when a licensee contracts with an independent entity to carry out safety related activities. For example, had the licensee manufactured a safety related component subject to 10 C.F.R. Part 50, Appendix B, NRC inspection authority over the licensee is clear.[16] When a licensee contracts with a vendor to

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reactor contractors and vendors. *Basically, Part 21 is a reporting requirement*, thus our inspectors will not only be investigating and evaluating those things that are reported, but will be looking for situations or conditions which may not have been reported but should have been.

Remarks Presented at Public Regional Meetings to Discuss Regulations (10 C.F.R. Part 21) for Reporting of Defects and Noncompliance, NUREG-302 (1978) (remarks of G.W. Reinmuth) (emphasis added).

[14] *See supra* text accompanying notes 4-6.

[15] *See, e.g.*, Note from James P. Murray to Howard K. Shapar (Feb. 10, 1981) (discussing authority to investigate vendor personnel); Memorandum from J.G. Davis (Aug. 17, 1978) (review of licensee contractor and vendor inspection program); Note *supra* note 5 (statutory authority to inspect vendors directly).

[16] Some component parts are included within the definition of both production and utilization facilities under the Act: "The term 'production facility' [or utilization facility] means . . . any important component part especially designed for such equipment or device as determined by the Commission." 42 U.S.C. § 2014(v), (cc) (1976). NRC need only

manufacture the same component, the licensee is still responsible to assure that the requirements of 10 C.F.R. Part 50, Appendix B are met and the NRC inspection authority over the activity now being conducted by the vendor is not diminished.[17] To hold otherwise would defeat the current regulatory scheme since Part 50 licensees rely on contractors and vendors to conduct many activities subject to NRC requirements.[18] Accordingly, a derivative power analysis can justify vendor inspection.

II. *ENFORCEMENT CAPABILITIES AGAINST VENDORS*

A. Statutory Enforcement Options

Given that vendor inspection has no independent statutory or regulatory basis, the enforcement strategies available against vendors for noncompliance with NRC requirements are limited.[19] Enforcement options under

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designate parts to invoke its authority under the pertinent licensing provisions. *See* Sections 101, 103 of the Act, 42 U.S.C. §§ 2131, 2133 (1976).

[17] *Cf. Union Electric Co.* (*Callaway Units 1 and 2*), LBP-78-31, 8 NRC 366 (1978) *aff'd* ALAB-527, 9 NRC 126 (1979) (holding that NRC has authority to inspect on site contractor pursuant to its public safety responsibilities).

[18] *See* Letter from James Lieberman, Director and Chief Counsel, Regional Operations and Enforcement, OELD to Edwin B. White, Jr., Attorney for UNC Resources Inc. (Feb. 3, 1983) (discussing Commission authority to inspect vendors) (copy attached).

[19] It is NRC's current practice to issue notices of nonconformance, formerly called notices of deviation, to vendors when deviations from contracts, regulations, and internal procedures, *inter alia*, are discovered. Notices of violation are issued to vendors for Part 21 infractions. Conversation with Ian Barnes, Vendor Inspection Branch, Region IV (December 16, 1982). Adoption of a proposed rule change will codify NRC's authority to issue notices of violation to vendors for Part 21

section 206 of the Energy Reorganization Act are limited to violations of that section.[20] Several enforcement strategies contained in the Act are inapplicable to vendors. Section 1816 of the Act, 42 U.S.C. § 2236 (1976) provides that a license may be revoked, *inter alia*, "for violation of, or failure to observe any of the terms and provisions of this Act or of any regulation of the Commission." Although revocation is a powerful enforcement device, vendors cannot be reached because of their status as non-licensees. Similarly, civil monetary penalties cannot be imposed on

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violations. *See infra* note 20. These issuances comprise the extent of NRC enforcement action against vendors at present.

[20] "The commission is authorized to conduct such reasonable inspections and other enforcement activities as needed to insure compliance with the provisions of *this* section." Section 206(d), 42 U.S.C. § 5846(d) (1976) (emphasis added).

In the past, NRC has utilized section 206(d) to impose a civil penalty against a vendor. *See* Letter from V. Stello to J.H. MacMillan, Vice President, Babcock and Wilcox co. (April 10, 1980) (Notice of Noncompliance, Vendor 99900400). OELD has cautioned that civil penalties are available only where "significant case specific facts" are present. "A legal theory to support a generic rule reaching all non-licensees does not appear legally viable in view of the plain words of Section 206 and the considerable legislative history of the section indicating that Congress did not intend such an approach." Memorandum from William J. Olmstead to Robert M. Bernero, Proposed Rule—Amendments to 10 C.F.R. Part 21 (October 14, 1982)(copy attached). The civil penalty provision of Section 206 applies only to individual directors or responsible officers of a firm. This view is supported by the legislative history of section 206(a), which "limits the liability [of the provision] to 'responsible' officers of the companies that might be involved . . . ." H.R. Conf. Rep. 1445, 93rd Cong., 2d Sess. 36 (1974).

It should also be noted that the commission recently issued a Notice of Proposed Rulemaking to authorize issuance of notices of violation under 10 C.F.R. 2.201 to persons subject to the agency's jurisdiction, including non-licensees. Since the proposed rule is designed in part to implement section 206 of the Energy Reorganization Act and Part 21, notices of violation could be issued against vendors who violate these provisions. *See* 47 Fed. Reg. 51402 (Nov. 15, 1982).

vendors pursuant to section 234(a)(2) of the Act, 42 U.S.C. § 2282(a)(2) (Supp. IV 1980). That provision authorizes assessment of civil penalties for violations where a section 186 license revocation is an available remedy.

Section 234(a)(1) of the Act, however, is broader in scope. It provides for imposition of civil penalties upon "any person who violates any licensing provision . . . or rule, regulation or order issued thereunder. . . ."[21] As defined by the Act, "person" includes any partnership, firm, corporation, association or individual other than the Commission. Section 11(s), 42 U.S.C. § 2014(s). Even though vendors are not licensees, it is nevertheless arguable that they are within the scope of section 234(a). By enacting a version of section 234(a) that makes no specific reference to licensees,[22] the Joint Committee on Atomic Energy apparently contemplated enforcement against other entities:

> [T]his new authority of the AEC to impose civil monetary penalties would not be confined to AEC licensees. Any person, *whether or not an AEC licensee,* would be subject to such a penalty if he committed a violation of the type covered by this legislation. ("Person" is defined by section 11s. of

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[21] The enumerated licensing provisions include section 101 (license requirement); 103 (commercial licenses); 104 (medical therapy and research and development); 107 (operators' licenses) and 109 (components and other parts of facilities) of the Act.

[22] Senator Pastore introduced the present version of Section 234(a), which empowers the Commission to impose civil penalties upon "any person who violates and [enumerated] licensing provision." *See* S. 1878, 91st Cong., 1st Sess. 1 (1969). Representative Holifield introduced a version of Section 234(a) which limited imposition of civil penalties to licensees: "*Any person licensed* pursuant to sections 53, 62, 81 and 101 of this Act who violates any provision of the regulations, order, or licenses issued under such sections shall be subject to a civil penalty . . . ." H.R. 9648, 91st Cong., 1st Sess. 1 (1969).

> the Act to include virtually every individual or entity other than the AEC). The Committee believes that the authority to impose civil penalties on persons not possessing an AEC license, as well as on licensees, is necessary if the legislation is to achieve its full purpose.

Joint Comm. on Atomic Energy, 91st Cong., 1st Sess., Report at 11-12 (1969).

However, the Joint Committee report goes on to provide examples which demonstrate the need for the boarder language of "any person who violates any licensing provision. . . ." These examples illustrate that entities which failed to obtain required licenses or allowed licenses to lapse would otherwise be insulated from civil penalties. *Id.* Apparently, the language change was adopted to remedy these kinds of situations. The Joint Committee report contained no indication that entities not required to be licensed, such as vendors, were subject to section 234(a). Hearings before the Joint Committee revealed a similar understanding. In his testimony, J.F. Hennessey, General Counsel of the Atomic Energy Commission, noted that section 234(a) did not apply to "Commission contractors or other persons . . . exempt from licensing." *AEC Omnibus Legislation—1969, Hearings Before Joint Comm. on Atomic Energy*, 91st Cong., 1st Sess. 29 (1969). Vendors would thus appear to be outside the scope of section 234(a).[23] Nevertheless, the views expressed in the legislative history can be reconciled. Apparently, it is not the license status which is critical to the application of section 234(a), but whether a licensing provision has been violated. Consequently,

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[23] However, vendors are not included in the licensing exclusions recited by section 110 of the act, 42 U.S.C. § 2140 (1976). Therefore, NRC has the authority to license vendors, if it so chooses. *See infra* Part IIB(2).

vendors, if capable of violating licensing provisions, or NRC rule, regulation or order promulgated therefrom, may be subject to civil penalty actions. *See* NRC General Statement of Policy and Procedure of Enforcement Actions, 47 Fed. Reg. 9987, 9991 n.3. However, at present there are no licensing requirements[24] directly on vendors. Thus, vendors may be insulated from civil penalties under the present regulatory scheme.

B. *Alternative Enforcement Strategies*

In addition to the present enforcement scheme several alternative enforcement strategies are available. The first utilizes NRC authority over its licensees. The second strategy necessitates promulgation of additional regulations to bring vendors into the regulatory process.

1. *Licensee Pressure*

Just as power to inspect vendors can be derived from valid Commission authority over licensees,[25] enforcement strategy can also be derivative. A licensee may contract out activities that it is licensed to perform but it remains ultimately liable for violations of NRC regulations.[26] Upon

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[24] Part 21, discussed *supra*, notes 11-13 and accompanying text, is not considered a licensing provision, as its bases are the Energy Reorganization Act and non-licensing provisions of the Act.

[25] *See supra* notes 14-16 and accompanying text.

[26] 10 C.F.R. § 50.100 (1982) provides for revocation, suspension or modification of both construction permits and licenses, for, *inter alia*, "violation of, or failure to observe, any of the terms and provisions of the [Atomic Energy Act], regulations, license, permit, or order of the Commission." In most instances, civil penalties can only be imposed upon licensees. *See supra* Part II.A. *See also Union Electric Co. (Callaway Units 1 and 2)*, LBP-78-31, 8 NRC 366 (1978) aff'd ALAB-527, 9 NRC 126 (1979) (holding licensee responsible for its refusal, as well as contractor's refusal, to permit on site inspection of contractor).

discovering vendor noncompliance, it seems justifiable for NRC to take enforcement action against its licensee.[27] In response, the licensee can be expected to exert pressure upon its vendor to comply with NRC regulations or lose its contract with the licensee. In either case, NRC's objective has been achieved— vendor compliance with NRC requirements.

Practical difficulties are encountered with this type of enforcement scheme. It is not unusual for a given vendor to be conducting work for a number of licensees. In such cases, enforcement actions against the several licensees may not be effective in focusing the vendor's attention on the particular problem. On the other hand, citing multiple licensees for one vendor's deficiencies may have positive benefits such as causing licensees to improve their audit programs or consolidate audit activities in a single licensee.

2. *General License Applicable to Vendors*

Section 109 of the Act, at 42 U.S.C. § 2139, empowers the Commission to issue general licenses for utilization facilities required to be licensed pursuant to section 101 of the Act, providing: "the Commission determines in writing that such general licensing will not constitute an unreasonable risk to the common defense and security." Section 101 of the Act, 42 U.S.C. §2131, requires a license for a panoply of circumstances, including manufacture of utilization facilities, defined as "any equipment or device . . . capable of making use of special nuclear material in such quantity as to be of significance . . . ." Also included within the definition of utilization facility is "any important component part especially designed for such equipment or device as determined by the Commission." *Id.* at section 11(cc); 42 U.S.C.

---

[27] The full range of enforcement actions are available against the licensee for violations caused by its contractors and vendors.

§ 2014(cc). Certain vendors are engaged in the manufacture of such component parts. Accordingly, one option before NRC is the issuance of a general license to these vendors.

The legislative history of section 109 is not inconsistent with issuing a general license to vendors. "Section 109 permits the Commission to exercise less stringent regulation over those component items which are defined as . . . utilization facilities merely because the Commission finds that they are important component parts of such facilities." *Amending the Atomic Energy Act of 1946, as amended, And For Other Purposes*, Joint Comm. on Atomic Energy, 83rd Cong., 2d Sess. 21 (1954).[28]

Issuance of a general license is an expeditious method by which certain vendors may become subject to NRC requirements. Unlike the procedure involved with issuance of a specific license,[29] the advantage of a general license is broad conferral of licensee status upon the defined class. More important, statutorily based enforcement measures would be available against vendors who violated the general license. Section 234(a) of the Atomic Energy

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[28] Although section 109 was amended by the Nuclear Non-Proliferation Act of 1978, Pub. L. No. 242, 95th Cong., 2d Sess. (1978), Section 109(a), which authorizes promulgation of general licenses, retained its original language. As explained by Senate committees reporting the bill:

> [This section] revises the language of Section 109 of the 1954 Act concerning licensing procedures for component parts of facilities. New subsection 109(a) is strictly a savings provision, which ensures that the domestic licensing provisions of the 1954 Act are in no way altered by these new procedures for the consideration of component exports.

S. Rep. No. 467, 95th Cong., 1st Sess. 20 (1977).

[29] A specific license would need to be issued in the name of a particular vendor. To follow this procedure for every supplier of component parts to the nuclear industry would be unnecessarily complicated.

Act provides for imposition of civil penalties against "[a]ny person who . . . violates any licensing provision of section . . . 109 [of the Atomic Energy Act] or any rule, regulation or order issued thereunder, or any term, condition, or limitation of any license issued thereunder." Thus vendors designated as general licensees would be subject to enforcement action.

Development of a general license for vendors is a major policy matter for the Commission. Given the current regulatory climate, promulgation of additional regulations may be unfeasible. It should be noted that issuance of a general license for vendors could create a problem of dual responsibility for component quality between vendors and reactor licensees. Further analysis may be required before implementing a vendor licensing scheme so as to avoid or minimize new enforcement problems.

IV. *CONCLUSIONS*

NRC is authorized to inspect vendors and has several options in implementing enforcement strategies against vendors. One alternative would be to utilize existing enforcement tools against licensees to force their vendors to comply with NRC requirements. Notices of nonconformance may also be issued against vendors. The Commission may also choose to engage in rulemaking and to exercise the general licensing authority granted under the Act, thereby permitting the Commission to take enforcement action directly against certain vendors.

James Lieberman
Director and Chief Counsel
Regional Operations and
Enforcement Division

DISTRIBUTION
Rdg.
Subj.
Cuoco chron
Lieberman chron
Olmstead
Brown, Reg. IV

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA,	)	
	)	
Petitioner,	)	
	)	
v.	)	Civil No.
	)	3:94MC122 (AHN)
	)	
CONSTRUCTION PRODUCTS RESEARCH, INC., FIVE STAR PRODUCTS, INC., and WILLIAM N. BABCOCK,	)	
	)	
Respondents.	)	

AFFIDAVIT OF WILLIAM N. BABCOCK

COUNTY OF FAIRFIELD	)	ss. Fairfield,
	)	
STATE OF CONNECTICUT	)	August 15, 1994

William N. Babcock, being duly sworn, deposes and says:

1. My name is William N. Babcock. I reside in Fairfield, Connecticut. I was employed by Respondents as President of Five Star, Inc. ("Five Star") and Vice-President of Construction Products Research, Inc. ("CPR"). I was so employed since 1982, but I left Respondents' employ on March 31, 1994.

2. I have personal knowledge of the events that serve as the basis for this affidavit, and I swear that the contents of this affidavit are true and correct.

3. On August 19, 1993, the disputed Subpoena was served on me at my offices by a man who identified himself as Ernest Wilson, an NRC investigator. When Mr. Wilson served the Subpoena on me, he stated, in approximately these words, "I guess now we'll find out whether we have jurisdiction over you or not."

FURTHER AFFIANT SAITH NOT.

William N. Babcock

Subscribed and sworn to before me,
this 15th day of August, 1994.

Notary Public
My Commission Expires: Nov. 30, 1995

BEFORE THE UNITED STATES
DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES

EDWARD P. HOLUB,	)	
	)	
Complainant,	)	
	)	
v.	)	No. 93 ERA 25
	)	
H. NASH BABCOCK, *et al.*,	)	
	)	
Respondents.	)	

State of Maryland	)	
	)	ss:
County of Prince Georges	)	

DECLARATION OF J. DUEANE DODSON, P.E.

1. My name is J. Dueane Dodson. I am an Assistant Project Manager with Heery International, Inc. ("Heery"), 8201 Corporate Drive, Suite 800, Landover, Maryland 20785. Founded in 1952, Heery is an architecture, interior design, engineering, program management and construction management firm with over 500 employees located in 22 offices throughout the United States and in Mexico City, Vancouver and London. It has been recognized annually by such industry publications as *Building Design & Construction* and *Engineering News Record* as one of the Nation's top firms. Heery provides a broad range of consulting services to private entities and government agencies engaged in large and small construction projects. Heery has been involved in power plant building construction for

Baltimore Gas and Electric Co. and Public Service Electric and Gas Co.

2. I received a B.S. in Civil Engineering, *cum laude*, in 1980 from North Carolina State University, Raleigh, North Carolina. I have been employed in the construction industry for over 14 years, and am a registered Professional Engineer in Ohio and the District of Columbia.

3. Among my other responsibilities over the course of my career, I worked for nine years as an Engineer and Assistant Project Manager for Chas. H. Tompkins Co. ("Tompkins"), 1333 H Street, N.W., Washington, D.C. Tompkins is a large general contractor and construction management company, doing over $100,000,000 in business annually. At Tompkins, I was responsible for contract administration, and dealing with subcontractors and suppliers. As a result of that experience and my other experience over the course of my career, I have necessarily become very familiar with the terminology employed in the construction industry. According to industry usage, a firm that supplies goods such as cement from an off-site plant is referred to as a supplier or a materialman, rather than as a contractor or subcontractor. Even if a supplier or materialman's representative visits the site, the supplier or materialman remains a supplier or materialman. In industry usage, a subcontractor normally has laborers and craftsmen doing productive work on the site, whereas if a supplier or materialman sent a representative to the site, that representative would not be engaged in direct labor, but would merely be available to monitor deliveries and resolve any disputes or delivery problems.

4. I have read the Verified Motion for Summary Decision in the above proceeding. I had no part in the drafting or preparation of that Motion. Based on my experience, I concur with the respondents' description of industry usage both in principle and as applied to their activities. In my opinion, they would not be considered

contractors or subcontractors by persons involved in the construction industry.

I declare under penalty of perjury that the foregoing is true and correct. Executed on December 1, 1994.

J. Dueane Dodson, P.E.

BEFORE THE UNITED STATES
DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES

EDWARD P. HOLUB,	)	
	)	
Complainant,	)	
	)	
v.	)	No. 93 ERA 25
	)	
H. NASH BABCOCK,	)	
et al.,	)	
	)	Chief Judge
Respondents.	)	Rosenzweig

State of New Jersey	)	
	)	ss.:
County of Burlington	)	

DECLARATION OF DONALD R. CRUVER

1. My name is Donald R. Cruver. I am Regional President, Eastern Region, Hill International, Inc. ("Hill"), One Levitt Parkway, Willingboro, New Jersey 08046. Hill is a construction consulting firm founded in 1976. It provides dispute resolution and project management services to public and private clients throughout the United States and abroad. Hill's primary services include project management, construction management, program management, project management oversight, troubled project turnaround, and project management support (staff extension). Our services also include dispute resolution, claims analysis and avoidance, alternative dispute resolution, litigation support, and expert witness testimony. Prior to joining Hill, I was employed in senior legal and

management positions in the United States and abroad with The M. W. Kellogg Co., Stone & Webster Engineering, and Fluor Corporation.

2. I received a B.A. from Wesleyan University in 1963 and a J.D. from New York University in 1967, and have done graduate work at New York University, the London School of Economics, Boston University School of Management, and the University of Chicago Advanced Management Program. I am a member of the Texas and Pennsylvania bars and am admitted to practice in various federal courts.

3. I have 27 years of engineering and construction industry experience both in the United States and in over 50 foreign countries. I have been an executive consultant and expert witness in connection with large, complex engineering, procurement and construction projects in general, and construction delivery systems and contracting custom and practice in particular. I am very familiar with the terminology, usages and practices of the construction industry. My experience includes nuclear power plant construction projects.

4. Based on my experience in construction management and related legal work, a firm that sells grout or cement for construction is properly referred to as a supplier or materialman rather than as a contractor or subcontractor. Ordinarily goods such as grout are sold by purchase order, but sometimes a contract document may be used. The proper terminology in the construction industry remains "supplier" or "materialman" even if a contract document were used.

5. I have read the Verified Motion for Summary Decision in the above proceeding. I had no part in the drafting or preparation of that motion. Based on my experience, I concur with the respondents' description of industry usage both in principle and as applied to their activities. In my opinion, they would not be considered

contractors or subcontractors by persons involved in the construction industry.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 9, 1994.

Donald R. Cruver

Supreme Court, U.S.
FILED
SEP 10 1996
CLERK

(2)

No. 95-2007

In the Supreme Court of the United States

OCTOBER TERM, 1995

CONSTRUCTION PRODUCTS RESEARCH, INC., ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WALTER DELLINGER
Acting Solicitor General
FRANK W. HUNGER
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23 pp

QUESTION PRESENTED

Whether the court of appeals correctly upheld enforcement of the Nuclear Regulatory Commission's subpoena *duces tecum* that sought documents related to a nuclear safety investigation within the NRC's investigative authority.

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In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-2007

CONSTRUCTION PRODUCTS RESEARCH, INC., ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 73 F.3d 464. The order of the district court (Pet. App. 57a) and the recommendation of the magistrate judge (Pet. App. 45a-56a) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on January 2, 1996. A petition for rehearing and a suggestion of rehearing in banc were denied on March 22, 1996. Pet. App. 58a-59a. The petition for writ of

certiorari was filed on June 13, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Nuclear Regulatory Commission (NRC) is a federal agency created to regulate the use and safety of atomic energy pursuant to the Atomic Energy Act of 1954 (AEA), 42 U.S.C. 2011 *et seq.*, and the Energy Reorganization Act of 1974 (ERA), 42 U.S.C. 5801 *et seq.* Pet. App. 3a. The NRC has authority over "public health and safety issues relating to the nuclear power industry in general, and over safety aspects involved in constructing and operating nuclear power plants, in particular." *Ibid.*, citing 42 U.S.C. 2012, 2201; 10 C.F.R. 1.11.

Petitioner Five Star Products, Inc. (Five Star) manufactures grout and structural concrete products and, for 20 years, sold grout to NRC licensees for use in the construction and repair of nuclear facilities. Pet. App. 3a. Prior to the events in this case, the grout carried Five Star's safety certification, signifying to the licensees that the material met the NRC's quality assurance testing standards required of all materials used in the construction of nuclear facilities. *Id.* at 24a; see 10 C.F.R. Pts. 21 and 50, App. B. Such certified material may be installed in safety-related systems without further testing by the NRC-licensed buyer. Pet. App. 46a. Petitioner Construction Products Research, Inc. (CPR) provided the testing services to Five Star that enabled Five Star to certify that the grout complied with the NRC safety standards. *Id.* at 3a.

In June 1992, Edward P. Holub, a CPR employee who was in charge of its quality assurance testing program, contacted the NRC to express his concern

that improper procedures were being used to test Five Star products. Pet. App. 4a. NRC inspectors attempted to inspect CPR's facility, but were denied access to the testing laboratory. *Ibid.* The inspectors contacted the United States Attorney, obtained a search warrant for the facility, and, on September 1, 1992, the United States Marshals executed the warrant and seized numerous documents related to CPR's testing of Five Star's products. *Ibid.* The NRC's investigation of Holub's allegations regarding the safety of petitioners' work place and the products they sold to NRC licensees led to a preliminary determination that most of Holub's allegations were correct. *Id.* at 47a. The NRC decided that immediate corrective action was not required, however, based upon the facts discovered to that date. Because petitioners ceased selling products with the safety certification in late August of 1992, the parties ultimately entered into a stipulation resolving any current enforcement dispute. See *id.* at 71a. The United States Attorney's office conducted a criminal investigation, but concluded it in January 1995 without filing charges. *Id.* at 47a & n.2.

Meanwhile, petitioners learned of Holub's actions and, on January 22, 1993, before the NRC investigation had been completed, CPR fired Holub. Pet. App. 47a. Holub filed a claim with the United States Department of Labor, pursuant to the whistleblower protection provision of the ERA, 42 U.S.C. 5851, which protects an employee from discharge or discrimination on account of having engaged in protected activity, such as assisting in carrying out the AEA by reporting safety concerns to the NRC. Holub alleged that CPR terminated him in retaliation for his notifying the NRC of his concerns about

petitioners' testing procedures. Pet. App. 4a. The Labor Department investigated the charge and found that Holub had engaged in protected activity and had been unlawfully terminated. *Ibid.* Petitioners sought further review of that administrative decision and their appeal is pending. Pet. 6 n.3; Pet. App. 4a, 47a.

The NRC thereafter became concerned about the possible safety implications of Holub's firing and instituted a second investigation to determine whether petitioners' treatment of whistleblowers posed a threat to public health and safety. Pet. App. 4a. In particular, the NRC sought to learn whether petitioners had discouraged any other would-be whistleblowers from coming forward and thereby had increased the likelihood that safety defects may have escaped detection by the NRC. *Ibid.* As part of its second investigation, the NRC issued a subpoena *duces tecum* to petitioner H. Nash Babcock, the custodian of CPR's records. *Id.* at 45a n.1. The subpoena sought production of corporate documents that fall within the following categories: (1) CPR's policies, procedures, and requirements regarding involuntary terminations; (2) "position descriptions of jobs" held by Holub and two other employees; (3) documents related to Holub's termination; and (4) Holub's personnel file. *Id.* at 4a.

Petitioners moved to quash the subpoena before the NRC, contending that the subpoena was not issued pursuant to a lawful purpose because, according to petitioners, the NRC lacked jurisdiction over them and their employment practices. Pet. App. 45a-46a. The NRC denied the motion and upheld the subpoena. *Id.* at 18a-44a. Petitioners still refused to comply with the subpoena, asserting that it arose out of an unauthorized investigation. *Id.* at 48a, 51a.

2. The United States, on behalf of the NRC, petitioned, pursuant to 42 U.S.C. 2201(c), for enforcement of the subpoena in the United States District Court for the District of Connecticut. Pet. App. 4a. The district court ordered enforcement. *Id.* at 57a.

a. Adopting the recommendation of a magistrate judge (Pet. App. 45a-56a, 57a), the district court upheld the validity of the subpoena. As a threshold matter, the court declined to address whether petitioners were subject to regulation by the NRC because, in an administrative subpoena enforcement proceeding, the court lacks authority to make such a determination. *Id.* at 49a, citing *Endicott Johnson Corp.* v. *Perkins*, 317 U.S. 501, 509 (1943); *United States* v. *Morton Salt Co.*, 338 U.S. 632, 642-643 (1950) (administrative power of investigation is analogous to grand jury which does not depend on existence of case or controversy for its power to obtain evidence and can investigate "merely on suspicion that the law is being violated, or even just because it wants assurances that it is not"). In an administrative subpoena enforcement proceeding, the agency "must show that the inquiry or investigation which the subpoena advances, not the party to whom it is directed, is within its authority." Pet. App. 53a. The district court therefore may consider only whether the inquiry is within the authority of the agency, whether the demand is sufficiently definite, and whether the information sought is reasonably relevant to the inquiry. *Id.* at 48a, citing *Morton Salt Co.*, 338 U.S. at 652; *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186 (1946).[1]

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[1] The court explained that petitioners would be able to litigate their jurisdictional challenges if the NRC began an

Because petitioners did not challenge either the definiteness of the subpoena demand or the relevance of the information sought by the subpoena, the court addressed the question whether the inquiry was within the NRC's authority. Pet. App. 53a n.7. On that issue, the subpoenaing agency "need only show that the subpoena seeks information about a matter or issue that Congress authorized the agency to investigate." *Id.* at 48a, citing *Endicott Johnson Corp.*, 317 U.S. at 508.

The court concluded that the NRC was authorized to subpoena the documents "in aid of a lawful investigation into the safety implications of [petitioners'] alleged retaliatory discharge of Holub" for reporting his safety concerns. Pet. App. 53a-54a. The court found that the NRC's legitimate safety concerns included "the possible chilling effect which Holub's retaliatory discharge might have on the willingness of [petitioners'] other employees to bring safety concerns to the NRC's attention and the resulting effect on the safety of [petitioners'] products that were sold to NRC licensees." *Id.* at 54a. NRC had a lawful right to investigate whether petitioners terminated other employees who had raised safety concerns and whether any retaliation against employees who had expressed safety concerns "created an atmosphere in which unsafe products could be sold to NRC licensees for use in nuclear power plants." *Ibid.*[2]

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enforcement proceeding to exercise regulatory authority over their business practices. Pet. App. 51a, 53a.

[2] The district court emphasized that the NRC was acting to ensure public health and safety and not to obtain a private remedy for Holub whose exclusive personal remedy lies with

b. The court also rejected petitioners' claim that the subpoena was overbroad and that the attorney-client privilege shielded the subpoenaed documents from disclosure. Pet. App. 54a-55a. The court found that the overbreadth challenge was not supported by the requisite showing that petitioners' compliance would unduly burden their business operations or that the NRC already possessed the documents. *Id.* at 55a. The court concluded that petitioners had not properly invoked or briefed the attorney-client privilege, having made only a blanket assertion, without particularizing their claims. *Ibid.*

3. a. The court of appeals affirmed. Pet. App. 1a-17a.[3] The court concluded that "[i]n light of the historically expansive interpretation of an agency's power to investigate," the subpoena "lay well within the NRC's authority because it is the primary body responsible for nuclear safety." *Id.* at 7a.[4]

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the Department of Labor pursuant to 42 U.S.C. 5851. Pet. App. 54a & n.8.

[3] Petitioners released to the NRC the documents that they conceded were not privileged, but continued to withhold the allegedly privileged documents. Pet. App. 5a. The court determined that the matter was not moot because of the documents still not surrendered and because petitioners retained a privacy interest in the documents they had surrendered which they claimed was infringed by the NRC's unlawful acquisition of the documents. *Id.* at 7a.

[4] As a preliminary matter, the court addressed its jurisdiction to hear the appeal despite the fact that the subpoenaed party had not been held in contempt. Pet. App. 5a-6a. The court recognized that a finding of contempt is generally required before an order enforcing a subpoena in a civil, criminal, or grand jury proceeding is final and appealable under 28 U.S.C. 1291. Pet. App. 5a-6a. But it held that an order enforcing a subpoena issued by a government agency in connection

The court reviewed the historical background of administrative investigatory authority, Pet. App. 8a-10a, pointing out that this Court's decision in *Endicott Johnson Corp.* established that probable cause to believe that a particular statute was being violated is not a prerequisite to an administrative agency investigation. Pet. App. 9a. Like a grand jury, an agency can investigate "merely on suspicion that the law is being violated, or even just because it wants assurance that it is not." *Id.* at 9a-10a, quoting *Morton Salt Co.*, 338 U.S. at 642-643. The court held that "at the subpoena enforcement stage, courts need not determine whether the subpoenaed party is within the agency's jurisdiction or covered by the statute it administers; rather the coverage determination should wait until an enforcement action is brought against the subpoenaed party." Pet. App. 10a, citing *Endicott Johnson Corp.*, 317 U.S. at 509; see also Pet. App. 14a-15a.

The court of appeals recognized that the disclosure sought by an agency subpoena is limited, however, by a requirement of reasonableness. Pet. App. 10a. That limitation is satisfied so long as the agency establishes that the investigation is conducted pursuant to a legitimate purpose, the inquiry is relevant to the purpose, the information sought is not already within the agency's possession, and the necessary administrative steps are followed. *Ibid.*

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with an administrative investigation is appealable under Section 1291 without a contempt finding because no other judicial proceeding is halted by permitting the subpoenaed party to appeal. Pet. App. 6a, citing *Cobbledick* v. *United States*, 309 U.S. 323, 330 (1940).

The court held that the NRC's subpoena to petitioners was reasonable. Pet. App. 11a-15a. The court cited the NRC's responsibility "to ensure that the generation and transmission of nuclear power do not unreasonably threaten public safety and welfare." *Id.* at 11a, citing 42 U.S.C. 2012. The NRC is expressly authorized to:

> make such studies and investigations, obtain such information and hold such meetings or hearings as the [NRC] may deem necessary or proper to assist it in exercising any authority provided in this chapter, * * * or any regulations or orders issued thereunder. For such purposes the [NRC] is authorized * * * by subpena to require any person to * * * appear and produce documents.

42 U.S.C. 2201(c), quoted at Pet. App. 11a.[5] The court ruled that it did not take any "stretch of the imagination" to find reasonable NRC's concern that public safety could be jeopardized by an employment practice "of squelching employee disclosure of nuclear risks." *Id.* at 12a. The information subpoenaed could reveal

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[5] The court rejected petitioners' argument that they are beyond the NRC's investigatory powers because, according to petitioners, they are not "persons" within the meaning of Section 2201(c), on account of their being suppliers to the nuclear industry and not subject to the AEA or the ERA. Pet. App. 14a-15a. The court held that petitioners clearly fall within the broad statutory definition of person set forth in 42 U.S.C. 2014(s). The court again distinguished the NRC's investigative authority from its enforcement jurisdiction, observing that, "[i]f and when the NRC decides to use the information obtained by the subpoena, [petitioners] may then challenge whether they fall within the NRC's enforcement jurisdiction." Pet. App. 15a, citing *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, 201 (1946); *Endicott Johnson Corp.*, 317 U.S. at 509.

the existence of such an employment practice or might assure the NRC that such practices are not taking place. *Id.* at 13a. The court observed that "[u]nless the NRC is permitted to investigate whether an employer regularly stifles disclosure of possible nuclear hazards," the practice could go unchecked—"a situation rife with safety ramifications." *Id.* at 12a. The court reasoned that, under its statutory mandate to ensure safety from nuclear risks, the NRC might use the information obtained by the subpoena to exercise its rule-making authority, to issue notices of non-conformance, or to report to Congress. *Id.* at 13a, citing 10 C.F.R. 1.11(b), 2.201; 42 U.S.C. 2210(p). Because the information subpoenaed clearly was relevant to a lawful purpose of NRC in the discharge of its duties, the court found that the issuance of the subpoena was within the NRC's statutory authority. Pet. App. 13a.

The court rejected petitioners' claim that the NRC did not have the authority to conduct the investigation at issue here because that authority had been delegated by Congress to the Department of Labor. Pet. App. 13a-14a. Although Congress gave to the Labor Department the authority, under the whistleblower protection provision of the ERA, 42 U.S.C. 5851, to resolve personal retaliation claims, the NRC's investigation here was not an attempt to adjudicate such a claim. Rather, the aim of the NRC's investigation was quite distinct—the NRC was investigating petitioners' *general* practices to determine what effect they might have on would-be whistleblowers. Pet. App. 14a. And, the NRC has the authority to order nuclear facilities to take steps to correct any threats to public health and safety, including those caused by the use of faulty materials,

whereas the Labor Department's remedial authority is limited to ordering reinstatement and backpay. *Ibid.*

b. The court of appeals also rejected petitioners' claim of attorney-client and work product privilege. Pet. App. 15a-17a. The court found that petitioners failed to meet their burden of establishing either privilege, citing their inadequate log, their overly general allegations, and their failure to provide sufficient information to support the claims as to individual documents. *Ibid.*

ARGUMENT

1. Petitioners do not dispute that the NRC has broad investigative subpoena power relating to matters of nuclear health and safety. Instead, they contend (Pet. 10-18) that the court of appeals erred in refusing to rule on their claim that they are not subject to regulation by the NRC.[6] Petitioners argue (Pet. 12) that the court of appeals misapplied *Endicott Johnson Corp.* v. *Perkins*, 317 U.S. 501, 508-509 (1943), and that the question of statutory coverage should have been decided at the subpoena enforcement stage in light of the fact that the NRC already had decided the coverage question and the subpoena did not seek information going to the coverage question. Petitioners also contend (Pet. 13-15) that the court of appeals' ruling conflicts with authority from other circuits regarding whether a question of regulatory

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[6] Petitioners assert (see Pet. 10 n.5) that, as mere suppliers of materials to the nuclear industry, they are not subject to regulation under the Atomic Energy Act of 1954 (AEA), 42 U.S.C. 2011 *et seq.*, or the Energy Reorganization Act of 1974 (ERA), 42 U.S.C. 5801 *et seq.*, and are not employers subject to the whistleblower protection statute, 42 U.S.C. 5851.

jurisdiction can be addressed at the subpoena enforcement stage.[7] Petitioners claim (Pet. 12, 16-18) that they will not have another opportunity to litigate the NRC's authority to subpoena the documents.

The court of appeals correctly followed *Endicott Johnson Corp.*, 317 U.S. at 508 & n.11, in holding that the district court did not err by refusing to address the question whether petitioners are subject to the NRC's regulation. The question before the court was the enforceability of the NRC's subpoena and, under *Endicott Johnson Corp.*, the district court was not required to decide whether petitioners were subject to regulation by the NRC because that was not a defense to the subpoena, but rather a matter that could be resolved when and if an administrative proceeding is brought against petitioners. 317 U.S. at 508-509. Moreover, the court correctly held that the documents were lawfully subpoenaed under *United States* v. *Morton Salt Co.*, 338 U.S. 632, 652 (1950), in that they were subpoenaed pursuant to an inquiry within the NRC's authority, the documents sought were relevant to that inquiry, and the subpoena was not indefinite. *Ibid.* The court of appeals correctly held that, so long as there is authority for the agency's investigation, the agency's enforcement jurisdiction over the subpoena recipient is not relevant to the question of the enforceability of an

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[7] Despite the outstanding enforcement order regarding all of the documents covered by the subpoena, petitioners continue to withhold some documents as to which their claim of privilege has been rejected on the merits by both the district court and the court of appeals. Pet. 9. Petitioners do not, however, challenge the court of appeals' ruling that they failed to establish a claim of privilege as to any of the documents requested. *Ibid.*

investigative subpoena. Simply put, the NRC's subpoena authority is not dependent upon its jurisdiction to take enforcement action against the subpoenaed entity. See Pet. App. 12a.[8]

Petitioners attempt to avoid *Endicott Johnson Corp.* by claiming that, in this particular case, the agency already ruled on the question whether petitioners are subject to its regulatory jurisdiction and, therefore, there is no reason for the court not to reach the issue as well. See Pet. 12. Petitioners' contention is, in essence, that the issue of the agency's enforcement jurisdiction became relevant to this particular subpoena enforcement proceeding because the NRC discussed the issue in the course of its decision denying petitioners' motion to quash the subpoena. But, the *dictum* in the NRC's opinion discussing its view of its regulatory enforcement authority beyond this action cannot alter the fact that this case is merely a subpoena enforcement proceeding and not a regulatory enforcement proceeding. The question of the NRC's jurisdiction to regulate petitioners (rather than merely obtain subpoenaed documents from them) does not raise a proper defense to the enforcement of the subpoena and would be ripe for judicial review only if the NRC were to attempt to exercise such regulatory authority over petitioners. See *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186 (1946) (holding that, although agency must defend purpose behind investigation, it is not required

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[8] The NRC's functions are not limited to enforcement proceedings and include, *inter alia*: Standard setting and rulemaking; technical reviews and studies; public hearings; issuance of authorizations, permits and licenses; inspection, investigation, and enforcement; evaluation of operating expenses; and confirmatory research. See 10 C.F.R. 1.11(b).

to prove cause of action at subpoena enforcement stage); *Endicott Johnson Corp.*, 317 U.S. at 509; *United States* v. *Sturm, Ruger & Co.*, 84 F.3d 1, 5 (1st Cir.) ("questions concerning the scope of an agency's substantive authority to regulate are not to be resolved in subpoena enforcement proceedings") petition for cert. pending No. 96-234 (filed Aug. 12, 1996); *SEC* v. *Brigadoon Scotch Distrib. Co.*, 480 F.2d 1047, 1053 (2d Cir. 1973), cert. denied, 415 U.S. 915 (1974); *Newmark & Co.* v. *Wirtz*, 330 F.2d 576, 578 (2d Cir. 1964).

The cases cited by petitioners (Pet. 13) as conflicting with the ruling below addressed circumstances that are distinguishable from the instant case in relevant respects. Denial of enforcement of an agency subpoena typically occurs where the agency's subpoena falls outside the agency's lawful investigative authority. See *FTC* v. *Ernstthal*, 607 F.2d 488, 490-491 (D.C. Cir. 1979). Most commonly those cases involve a statute that narrowly circumscribes the agency's investigative authority or specifically exempts certain entities from the agency's investigative reach, thus giving rise to investigatory coverage questions that are ripe for review at the investigative stage. *E.g.*, *FTC* v. *Miller*, 549 F.2d 452, 455 (7th Cir. 1977) (common carriers exempt from FTC's investigative authority; subpoenaed parties "concede[d] that if they were insisting only on the right not to be regulated, as distinguished from the right not to be investigated, the strong policy against litigating the issue of coverage * * * in a subpoena enforcement proceeding" would have rendered their position untenable); *Reich* v. *Great Lakes Indian Fish & Wildlife Comm'n*, 4 F.3d 490 (7th Cir. 1993) (tribal entities exempt from federal wage and hour laws and

not subject to subpoena authority); *FEC* v. *Florida for Kennedy Comm.*, 681 F.2d 1281 (11th Cir. 1982) (constitutional constraints on Commission's jurisdiction to regulate exercise of political rights). *Jewel Cos.* v. *FTC*, 432 F.2d 1155 (7th Cir. 1970), and *Territorial Ct. of the Virgin Islands* v. *Richards*, 847 F.2d 108 (3d Cir.), cert. denied, 488 U.S. 955 (1988), are to the same effect. As the cases cited by petitioner acknowledge, however, "an individual may not normally resist an administrative subpoena on the ground that the agency lacks regulatory jurisdiction if the subpoena is issued at the investigational stage of the proceeding." *Ernstthal*, 607 F.2d at 490-491. In *FTC* v. *Feldman*, 532 F.2d 1092, 1095-1096 (1976), the Seventh Circuit also expressly emphasized that it is well settled that courts "should not interrupt the administrative process except under very limited and exceptional circumstances." Cf. *FTC* v. *Standard Oil Co.*, 449 U.S. 232 (1980). The instant case does not present such circumstances.

Petitioners err in suggesting (Pet. 16-17) that, by not reaching the issue of the scope of NRC enforcement jurisdiction, the court of appeals deprived them of the opportunity to litigate the NRC's subpoena authority. Petitioners fully litigated the NRC's *investigative* authority to subpoena the records requested here and the court of appeals correctly rejected petitioners' arguments, finding a nexus between the NRC's investigation and safety implications of petitioners' activities. The only matter that must await later adjudication is the authority of the NRC to exercise jurisdiction to *regulate* petitioners, and that matter will be ripe for adjudication only if and when the NRC attempts to exercise such jurisdiction.

2. Petitioners contend (Pet. 18-19) that the court of appeals erred because it failed to identify a specific statutory grant of authority for the NRC's investigation and relied only on the general grant of subpoena power to the NRC in 42 U.S.C. 2201(c). It is well established that the NRC has broad authority over public health and safety issues relating to the nuclear power industry in general, *English* v. *General Elec. Co.*, 496 U.S. 72, 81-82 (1990), and over "radiological safety aspects involved in the construction and operation of a nuclear plant" in particular, *Pacific Gas & Elec. Co.* v. *State Energy Resources Conservation & Devel. Comm'n*, 461 U.S. 190, 205 (1983). The agency's source of plenary authority in this field is the Atomic Energy Act of 1954 (AEA), 42 U.S.C. 2011 *et seq.*, and the Energy Reorganization Act of 1974 (ERA), 42 U.S.C. 5801 *et seq.*

The courts below correctly held that the AEA, as supplemented by the ERA, constitutes fully sufficient legal authority for the NRC's investigation underlying the subpoena at issue here. As the district court found:

> [T]he NRC is authorized to subpoena documents from respondents in aid of a lawful investigation into the safety implications of respondents' alleged retaliatory discharge of Holub for engaging in protected activity. The legitimate safety concerns of the NRC include the possible chilling effect which Holub's retaliatory discharge might have on the willingness of respondents' other employees to bring safety concerns to the NRC's attention and the resulting effect on the safety of respondents' products that were sold to NRC licensees.

Pet. App. 53a-54a. Similarly, the court of appeals held:

> [T]he NRC is attempting to investigate [r]espondents' *general* employment practices to determine whether those practices are having a chilling effect on would-be whistleblowers. That aim is quite distinct from the aim of the DOL investigation.

Id. at 14a.

The findings by the courts of a nexus between the subpoenaed materials and a lawful NRC inquiry into nuclear safety concerns sufficed to support the enforcement of the subpoena under *Endicott Johnson Corp.*, 317 U.S. at 508 & n.11. See also *Morton Salt Co.*, 338 U.S. at 642-643; *Sturm, Ruger & Co.*, 84 F.3d at 4. The court of appeals' analysis is also consistent with decisions of the First and Third Circuits which have addressed the scope of the NRC's subpoena authority. *United States* v. *Comley*, 890 F.2d 539 (1st Cir. 1989); *United States* v. *Oncology Servs. Corp.*, 60 F.3d 1015, 1018-1019 (3d Cir. 1995).

3. Petitioners contend (Pet. 20-23) that the court of appeals' decision conflicts with this Court's decision in *English* v. *General Elec. Co.*, 496 U.S. 72 (1990), and the Tenth Circuit's decision in *Kansas Gas & Elec. Co.* v. *Brock*, 780 F.2d 1505 (1985), cert. denied, 478 U.S. 1011 (1986).

Petitioners' contention is premised on the erroneous view of the NRC's investigation as an investigation for purposes of protecting employees from adverse employment consequences. But the NRC was not taking a "role in employment matters" as petitioners contend (Pet. 21). The court of appeals below specifically recognized the distinction between a NRC investigation of general nuclear safety and a

Department of Labor proceeding on behalf of a nuclear whistleblower under 42 U.S.C. 5851(b), stating:

> It bears emphasis * * * that the NRC is not trying to adjudicate Holub's individual retaliation claim; Holub himself has already filed a claim with the DOL and has received a favorable decision. Instead, the NRC is attempting to investigate Respondents' *general* employment practices to determine whether those practices are having a chilling effect on would-be whistleblowers.

Pet. App. 14a. Further, the court below noted (*ibid.*) that the implications of whistleblower retaliation in this context go far beyond the rights of the workforce. If employees are stifled from disclosing defects in safety-grade products supplied to nuclear facilities, there is an indisputable potential for harm to the general health and safety of the public. The fact that the NRC did not find a safety defect in petitioners' product during its initial investigation (Pet. 23) does not eliminate the NRC's safety concern regarding whether disclosure of defects was being chilled by threats of retaliation. See, *e.g.*, 10 C.F.R. 50.7. For example, if the NRC finds evidence of a pattern of discrimination and harassment that compromised the integrity of petitioners' products, the NRC may direct all nuclear plants who may have purchased such products to take appropriate action to ensure that those products do not adversely affect public health and safety. The court found that the NRC subpoena was based on this broader concern. See Pet. App. 14a.

Thus, the court of appeals' ruling is not inconsistent with this Court's decision in *English* v. *General*

Electric Co., or the Tenth Circuit's decision in *Kansas Gas*. In *English*, the Court merely held that a whistleblower discrimination action under 42 U.S.C. 5851 does not preempt a state law tort claim. 496 U.S. at 82. In reaching that conclusion, the Court reiterated that the federal government has preempted the field of radiological safety aspects involved in the construction and operation of a nuclear plant. In *Kansas Gas*, the Tenth Circuit concluded that, although the Labor Department has exclusive jurisdiction over remedies for individual whistleblower retaliation claims under Section 5851, the NRC has regulatory responsibility for all other matters relating to nuclear safety. 780 F.2d at 1508-1509. The NRC's subpoena to petitioners sought documents in aid of a lawful investigation into such nuclear safety matters.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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In the Supreme Court of the United States

OCTOBER TERM, 1995

CONSTRUCTION PRODUCTS RESEARCH, INC., FIVE STAR PRODUCTS, INC. AND H. NASH BABCOCK, *Petitioners*,

v.

UNITED STATES OF AMERICA, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' REPLY BRIEF

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SEPTEMBER 1996

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In the Supreme Court of the United States

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' REPLY BRIEF

Argument

Certiorari should be granted for three main reasons. First, the decision below stands in defiance of the unanimous decision of this Court, rooted in the plain meaning of an Act of Congress, that employment practices are not the NRC's business. The decision below compounds this error by refusing to address this issue of agency jurisdiction on which the agency has already definitively spoken, and by disregarding the fact that the subpoenaed party will have no future opportunity to obtain judicial review of the issue. Finally, the Court of Appeals' willingness to enforce the subpoena absent a grant of substantive statutory authority to the agency creates a split with at least five other Circuits.

1. The government's Question Presented characterizes the NRC proceeding in which the disputed subpoena was issued as a "nuclear safety investigation." Later, taking its cue from the Court of Appeals, the government maintains that the NRC was merely investigating petitioners' "*general* employment practices." Opp. 17-18. These characterizations are transparently incorrect. As the NRC itself stated, the purpose of the investigation is

> "to determine if CPR deliberately violated the NRC's whistleblower protection provision [10 C.F.R. § 50.7] by firing Mr. Holub when it discovered that he had informed the NRC of his safety concerns." *In re Henry Allen*, 39 NRC 336, 345 (1994).

The text of the subpoena confirms the accuracy of this description, as does the NRC's statement that what it calls "The Holub Investigation," Pet. 26a, concerns "the circumstances of [a particular, named employee's] termination." Pet. 27a-28a. The NRC's willingness to permit petitioners' products to continue to be sold to the nuclear industry, 61 Fed. Reg. 562 (1996); Pet. 5, 71a, also demonstrates that those products raise no safety concerns. Against this backdrop, the government's effort to paint the subpoena in radioactive colors—a ploy to which it is no stranger, *e.g.*, *Professional Reactor Operator Soc'y v. U.S. Nuclear Regulatory Commission*, 939 F.2d 1047, 1052 (D.C. Cir. 1991) (R. B. Ginsburg, J.)—is designed to distract the Court from the issues and avoid the clear teaching of *English v. General Elec. Co.*, 496 U.S. 72, 83 n.6 (1990).[1]

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[1] There is no need to elaborate on *English* in this reply brief. The government's Opposition (at 19) simply ignores the pertinent portion of that unanimous decision. This Court focused expressly on the statutory allocation of responsibility between the NRC and the Department of Labor in a manner that is entirely consonant with petitioners' position

2. The government concedes that the NRC has conducted two separate investigations of petitioners. Opp. 3-4. The *first* investigation—into the safety of their products that were sold to the nuclear industry—was conducted pursuant to the NRC's lawful authority over petitioners under 42 U.S.C. § 5846. Pet. 5-6; Pet. 24a-26a.[2] That provision is the NRC's *only* authority over suppliers such as petitioners. Congress added it to the ERA in 1974 precisely because the NRC did not have AEA authority over suppliers. The first investigation found no safety impediment to sale of petitioners' products. 61 Fed. Reg. 562 (1996).

3. The subpoena at issue opened the NRC's *second* investigation. The agency—as opposed to the *post hoc* rationalization of its counsel—invoked 42 U.S.C. § 5851 as authority for the subpoena. Pet. 34a-35a. The government has abandoned reliance on that provision, Opp. 17-19, presumably because it does not help the NRC. Unlike § 5846, § 5851 does not cover suppliers. Above all, even if it did, it is a grant of authority only to the Secretary of Labor as a matter of plain meaning. *See English, supra.*[3]

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and entirely at odds with the strained analysis offered by the Court of Appeals. The government's cavalier treatment of the Tenth Circuit's opinion in *Kansas Gas & Elec. Co. v. Brock*, 780 F.2d 1505, 1509 (10th Cir. 1985), *cert. denied*, 478 U.S. 1011 (1986) is equally surprising.

[2] The government is incorrect in asserting (Opp. 9 n.5, 11 n.6) that petitioners contend that they are "beyond the NRC's investigatory powers" and "are not subject to regulation under . . . the Energy Reorganization Act of 1974 (ERA), 42 U.S.C. 5801 *et seq.*" As suppliers, they are subject to NRC authority under 42 U.S.C. § 5846, which is part of the ERA and not part of the Atomic Energy Act ("AEA"). Petitioners are *not* subject to the AEA or parts of the ERA other than § 5846, such as § 5851 (on which the NRC relied in substantial part, Pet. 30a-38a, in upholding the subpoena).

[3] Section 5846 refers to those "supplying" products to the nuclear industry as being subject to its terms; the subsequently enacted § 5851 applies to NRC licensees and their "contractors" but does *not* refer to suppliers. Congress amended § 5851 in 1992 to overturn *Adams v. Dole*,

4. The NRC also relied on its general subpoena power under the AEA as support for its investigation of Mr. Holub's termination. Pet. 30a. The flaw in this is that the NRC had to have specific statutory authority to conduct the second investigation. Pet. 18-19.

a. The text of AEA § 161c limits the NRC's subpoena power to investigations in aid of "authority provided in this chapter, or in the administration or enforcement of this chapter, or any regulations or orders issued thereunder." "[T]his chapter" is the AEA, yet throughout this litigation—and to the present moment—the government has failed to cite any specific provision of that statute that authorizes the NRC to concern itself with employment practices, let alone nonlicensees' employment practices. Rather, the government contents itself with a sweeping "*et seq.*" reference to the entire AEA and ERA. Opp. 16. Having the power to subpoena information from all "persons"[4] does not, contrary to the Opposition, grant an agency authority over matters *outside* its statutory responsibilities. To overlook this is to confuse tools with jobs; a subpoena is merely a tool.

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927 F.2d 771 (4th Cir.), *cert. denied*, 502 U.S. 837 (1991). It considered amending § 5851 to cover all employers engaged in any activity under the ERA or AEA, but ultimately decided not do so, opting instead to add certain defined categories of "employers" to those previously covered. None of the categories added in 1992 extends to petitioners.

[4] Of course, if the NRC had a substantive grant of authority, it could subpoena relevant information from anyone who possessed it. But the mere fact that petitioners are "persons" within the meaning of the AEA (42 U.S.C. §2014(z)), does not grant the NRC authority over their employment practices. Contrary to the government's claim, Opp. 9 n.5, petitioners have never contended that they are not "persons" within the meaning of the AEA.

b. An agency investigation cannot be lawful if it is not based on specific statutory authority.[5] Otherwise, the NRC's power to subpoena information from any "person" would be a roving commission without precedent in American administrative law. It would permit the agency to investigate literally anything and, as a practical matter, would entirely thwart judicial review of agency claims to investigative jurisdiction—something Congress cannot be presumed to have intended. *E.g., Bowen v. Michigan Acad. of Family Physicians*, 476 U.S. 667, 670 (1986); *Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967) (collecting cases). But the NRC has no such roving commission. Congress did not give it authority over employment matters, even though such matters may implicate nuclear safety. *English*, 496 U.S. at 83 & n.6; *Kansas Gas & Elec., supra*, 780 F.2d at 1509. If embraced, the government's position would permit the NRC to investigate, for example, unfair labor practices or violations of collective bargaining agreements or the overtime provisions of the Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq.* (1994), each of which is the responsibility of some other agency. While the NRC's lack of authority over whistleblowing is all too apparent from its inability to point to any substantive grant of authority in the AEA, it is highly probative that Congress has given *another* agency—the Department of Labor—precisely that authority. Thus, the NRC's lack of AEA authority to support this subpoena, and the Department of Labor's express grant of authority, are two sides of the same legislative coin.

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[5] The decision below conflicts with the holdings of at least five Circuits regarding the need for specific statutory authority to support a subpoena. Pet. 18-19. The government's effort to distinguish the cases was anticipated in the petition and is unpersuasive.

5. In its effort to avoid judicial review of petitioners' jurisdictional claim, the government maintains that the NRC's assertion of jurisdiction was dictum. Opp. 13. This is plainly incorrect, as a glance at the NRC's decision reveals. Additionally, it slights the agency's role under *Endicott Johnson Corp. v. Perkins*, 317 U.S. 501 (1943). The Court there held that if an agency had not ruled on jurisdictional issues, the subpoena enforcement court has no duty to do so either. *Id.* at 508-09. But the opinion plainly leaves it to the agency's discretion whether to address such issues at the subpoena stage. Here, the NRC addressed the jurisdictional issue explicitly and at great length, following extensive briefing. Its published opinion says in so many words that it was asserting jurisdiction. Pet. 30a, 38a. Where this is the case, nothing in *Endicott Johnson* frees the subpoena enforcement court from the duty to determine the legal correctness of the agency's jurisdictional claim. Petitioners have a right to that determination now under *United States v. Morton Salt Co.*, 338 U.S. 632, 652-54 (1950).

6. Finally, the government observes that petitioners could litigate the NRC's jurisdiction "only if the NRC were to attempt to exercise such regulatory authority over" them. Opp. 13; *see also id.* 15. The difficulty with this is that the government has not taken issue with petitioners' demonstration that there can be no future opportunity to litigate the issue because petitioners are not subject to the NRC's regulatory regime and none of the other kinds of steps the NRC can take are judicially reviewable. *See* Pet. 16-18.[6] The government's deafening silence on this critical

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[6] Rummaging in its regulations, the government has belatedly proffered a variety of further nonenforcement actions it can take, beyond the three cited by the Court of Appeals. Opp. 13 n.8. Far from aiding the government's cause, these afterthoughts confirm that this is petitioners' only opportunity for judicial review of their jurisdictional objection to the

point ignores the teaching of *Morton Salt*, 338 U.S. at 654, that courts should review agency jurisdictional claims when "no chance is given for a test of reasonable objections" later. That silence also confirms petitioners' contention that for purposes of judicial review of the NRC's assertion of authority over them, it truly is "now or never." *See* Pet. 17-18 & n.11.

Conclusion

For the foregoing reasons and those previously stated, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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subpoena. The new entrants on the list of possible agency activities are either patently not subject to judicial review at all (*e.g.*, "technical reviews and studies," "public hearings," "confirmatory research," "evaluation of operating expenses" [*sic*; "operating experience" in original]) or patently not subject to judicial review at petitioners' behest (NRC licensure of third parties). *See* Pet. 16-17.

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